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IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 853

MANUEL M. BERNSTEIN AND WARREN S. SHAW T/A MANNING SHAW REALTY COMPANY,

Appellants,

vs.

REAL ESTATE COMMISSION OF MARYLAND AND ALLEN KLEIMAN AND JEANETTE KLEIMAN, HIS WIFE, AND BERNARD CHERRY AND DORA CHERRY, HIS WIFE,

Appellees.

MANUEL M. BERNSTEIN AND WARREN S. SHAW, T/A MANNING SHAW REALTY COMPANY,

Appellants,

vs.

REAL ESTATE COMMISSION OF MARYLAND AND ALLENDALE-LYNDHURST IMPROVEMENT ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

1. The prior proceedings in this case are reported at Md. , and 156 A. 2d 653. A copy of the opinion of the Court of Appeals of Maryland is attached hereto, p. 15. The

opinion of the lower court appears in the record at page 796. The Order of the Real Estate Commission of Maryland in the case of *Manuel M. Bernstein, et al. v. Allendale-Lyndhurst Improvement Association, Inc., et al.*, appears at page 741 of the record; and the Order of the Real Estate Commission in the case of *Manuel M. Bernstein, et al. v. Allen Kleiman, et al.*, appears at page 505 of the record.

2. The proceedings resulting in this appeal, which involves two cases in one record, were commenced by the filing of two complaints against these appellants before the Real Estate Commission of Maryland, a state real estate administrative agency. The agency's powers are conferred upon it by Article 56 of the Maryland Code Annotated (1957), and specifically, Section 224 of that Article. The complaints resulted in a suspension for a three month period of the real estate brokers licenses of the appellants by the Commission, and that determination was affirmed by the Court of Appeals of Maryland by its decree entered on the 18th day of December, 1959. Following the denial of a motion for reargument on the 20th day of January, 1960, a Notice of Appeal to this Court was filed on the 11th day of February, 1960. The notice was filed in the Court of Appeals of Maryland.

(a) Jurisdiction is conferred upon this court by Title 28, U.S.C., Section 1257 (2);

(b) That this court has jurisdiction is plainly shown by the following cases: *Myles Salt Company v. Board of Commissioners*, 36 S. Ct. 204, 239 U.S. 478 (1916); *Sultan Railway & Timber Company v. Department of Labor and Industries*, 48 S. Ct. 505, 277 U.S. 135, (1928); *McCollum v. Board of Education, etc.*, 68 S. Ct. 461, 333 U.S. 203, 92 L. Ed. 648, 2 A.L.R. 2d 1338 (1948); *Ireland v. Woods*, 38 S. Ct. 319, 246 U.S. 323, 62 L. Ed. 745 (1918); *Norris v. Ala-*

bama, 55 S. Ct. 579, 294 U.S. 587, 79 L. Ed. 1074 (1935); *Gross v. United States Mortgage Company*, 2 S. Ct. 940, 108 U.S. 477 (1883); *Parmelee v. Lawrence*, 11 Wall. 36; *Murdock v. City of Memphis*, 87 U.S. 590, 20 Wall. 590, 22 L. Ed. 429; *Dewey v. City of Des Moines*, 19 S. Ct. 379, 173 U.S. 193 (1899); *West Chicago Street Railway Company v. Chicago*, 26 S. Ct. 518, 201 U.S. 506, 50 L. Ed. 845 (1906).

(c) Article 56 of the Maryland Code and the pertinent sections may be found in the Appendix to this Jurisdictional Statement at page 11.

3. The question presented by this appeal is whether, consistently with the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, the penalizing powers of the Real Estate Commission of Maryland may be invoked on complaint of private citizens whose primary motive is to prevent the sale of homes to Negroes in formerly all-white neighborhoods, and a penalty imposed (upon these appellant brokers), under statutory authority, for an alleged evil, which is insubstantial and technical, as distinguished from one which is real and substantial.

4. The proceedings which resulted in this appeal were commenced by the filing of a complaint with the Real Estate Commission of Maryland by Allen Kleiman, his wife, and Bernard Cherry and his wife. The complainant (appearing at page 5 of the record) alleged, *inter alia*, that the complainants were owners of the property situated in Baltimore City known as 3801 Grantley Road, and 3802 Grantley Road, respectively. It further alleged that the respondents (before the Commission) Manning-Shaw Realty Company was a partnership consisting of Manuel M. Bernstein and Warren S. Shaw. The complaint alleged also that the Manning-Shaw Realty Company, from the inception of its business, has specialized in the sale to

Negroes of residential property in formerly all-white neighborhoods, and were widely known in Baltimore for their engaging in a practice known as "block-busting" and the promotion of panic and instability in such neighborhoods, for the purpose of capitalizing on attitudes and prejudices in order to obtain as many listings as possible in such neighborhoods. It was further alleged that such practices created an artificial glut on the market in such neighborhoods and adversely affected the morale and property value.

Following the foregoing statement, the complaint alleged that in the early Spring of 1958, the respondents (before the Commission) placed on the front door of the property known as 800 Grantley Road in Baltimore City (which is in close proximity to the property of the complainants) a sign reading "For Sale — Manning-Shaw Realty Company." At the time the sign was posted, it was alleged there were no Negro residents on the said block; that on the 15th day of June a large legend in gaudy, luminous-type orange letters, forming the word "Sold", was placed over the sign saying "For Sale." The complaint further alleged that the property had been shown to one David F. Riddick, a Negro, subsequent to the day on which the "Sold" sign was placed upon the property. The general intendment was that the property had been falsely advertised as sold when in fact it had not been. The complaint further alleged that the placing of the "Sold" sign on the property was "a willful and deliberate falsehood and misrepresentation, one of the said purposes of which was to frighten the neighbors into the belief that Negroes had moved into the block and to obtain, thereby, additional listings for sales to Negroes by advertising the effectiveness of Manning-Shaw as a broker in such enterprise."

The complaint also contained allegations regarding Mr. Bernstein's alleged criminal record, but that is not material to this appeal since no action was taken by the Commission on the basis of such allegations. In a concluding paragraph, the complaint specifically alleged that the conduct of the brokers constituted "a continued and flagrant course of misrepresentation under Article 56, Section 224 (b);" that such conduct demonstrated "bad faith, untrustworthiness, dishonest, fraudulent, and improper dealings under Article 56, Section 224 (g);" that such conduct constituted "misleading and untruthful advertising under Article 56, Section 224 (j);" and certain other allegations not here material. The complainants claimed that the brokers were not "fit persons to hold a real estate broker's license" and their licenses should therefore be revoked.

A second complaint was filed against the appellants by the Allendale-Lyndhurst Improvement Association on October 14, 1958. That complaint, appearing at page 678 of the record, alleged simply that Manning-Shaw Realty Company was using an illegal form of listing agreement. A copy of that agreement was attached to the complaint as an exhibit. It further alleged that the agreement provided that "the owner reserves the right to withdraw the property from said agent at any time after six months. But it is understood that this agreement is not revocable (sic) while any negotiations are pending for sale or exchange of the property." It also sets forth the provisions of Article 56, Section 224 (o) prohibiting a real estate broker from "accepting a listing contract to sell property unless such contract provides for a definite termination date without notice from either party."

Answers were filed by the real estate brokers in response to both of the above complaints. The answers denied generally the allegations of any wrong-doing, and further al-

leged that the complaint was an ill-concealed attempt to harass and embarrass these respondents who conduct their business in good faith and in a competent, trustworthy, honest, and lawful manner * * *" and it further alleged that the complaint was "an ill-disguised effort to deprive the respondents of their lawful rights as guaranteed by the Constitution of the United States and the decisions of the Supreme Court of the United States." With respect to the charge that the brokers were using an unlawful listing agreement their answer denied that the agreement was unlawful and specifically asserted that the brokers past practice demonstrated that their listing agreement had always been used in a manner consistent with the requirements of Section 224 (o) of the statute. Their answer further asserted that the complaint was an effort to deprive the respondents of their rights guaranteed by the Constitution of the United States as interpreted by the decisions of the Supreme Court of the United States.

The hearing in the *Kleiman* case (before the Commission) was commenced on February 3, 1959. Extensive testimony was introduced, all of it over objection by the appellants, to show that the appellants had engaged in so-called "block-busting" and further to show that when a Manning Shaw sign appeared in the neighborhood it had a tendency to cause a general exodus from an otherwise "fairly stable neighborhood" (R. 40). Further testimony was introduced by the Kleimans to show that their primary concern was to prevent their neighborhood from becoming completely colored in its racial structure, and that while they had no objection to having Negro neighbors, because they were not prejudiced, they did not want too many Negro neighbors (R. 68-69). Evidence was introduced which indicated that the person to whom 3800 Grantley Road had been purportedly sold had not occupied the premises, had not

heated it, and had insufficient income to meet the monthly mortgage obligations. The brokers introduced evidence to show that the property had in fact been sold under a conditional sales contract, and that a down payment in the amount of approximately $2.000 had been made by the purchaser; that the purchaser was attempting to sell two other pieces of property owned by himself for the purpose of securing additional money with which to finance the purchase of 3800 Grantley Road (R. 163 et seq).

The Commission found as a fact that there had not been a "bona fide" sale of the property, and that therefore the brokers were guilty of violating Article 56, in that the posting of the said "Sold" sign when the property had not been sold was a "continued and flagrant course of misrepresentation in violation of Section 224(b) of Article 56", and that the brokers had violated Section 224(j) of that Article by engaging in "misleading and untruthful advertising."

During the hearing an attempt was made by counsel for these appellants to introduce evidence which would have shown that the real motive of the complaints was to prevent Manning Shaw Realty Company from selling homes to Negroes in formerly all-white neighborhoods. The Commission rejected such evidence, having earlier stated that it was not "concerned" with block-busting per se, but was interested solely in determining whether the brokers had violated any of the sections of the real estate statute.

Pursuant to the provisions of Article 41, Sections 244-256, the brokers appealed from the decision of the Real Estate Commission to the Baltimore City Court. They urged in that appeal that the Commission had committed error in certain regards not here material, and further sought to introduce evidence to show the unlawful purposes of the

complaints, but that evidence was there also rejected. It should also be noted that in their appeal to the Baltimore City Court, the brokers specifically asserted that the complaints were the result of an unconstitutional conspiracy by the complainants and their associates to deprive the brokers and their customers of rights guaranteed to them by the Fourteenth Amendment to the United States Constitution.

The lower court, Judge Oppenheimer presiding, refused to receive evidence which the respondents there contended would have shown that the sole purpose of the complaints was to prevent the brokers from continuing their practice of selling property to negroes in formerly all-white neighborhoods. The lower court further stated that although it recognized the right of all persons to sell and own property without regard to race, color, creed or religion, under the doctrine of *Shelly v. Kramer*, the Commission had stated during the proceedings that it was not interested in "block-busting", and would not receive evidence upon the subject one way or the other. The court was of the opinion that since the Commission had declared upon the record that it was not concerned with "block-busting" and was solely concerned with the question whether the brokers had violated the statute, the constitutional rights of these appellants had not been violated. It should be noted, however, that the Commission did, in fact, receive evidence, over the objection of these appellants, which was relevant only to the issue of so-called "block-busting." The testimony of Carl Heinmuller, Jr., which was objected to and admitted into evidence over objection by counsel for the appellants, was in substance that the appearance of a Manning-Shaw "Sold" sign, or the sign of any other broker known to deal primarily with Negro people would probably and very likely "have an effect on property values in the block and

neighborhood;" and further that the "ultimate effect usually is that property values, from a dollar standpoint, will tend to go down because of the general exodus from an otherwise fairly stable neighborhood" (R. 40).

In addition, the testimony of Mrs. Kleiman was admitted over objection and related to matters which were relevant solely to the question of so-called "block-busting." Her testimony was, in substance, that her primary purposes for filing the complaint was to prevent her neighborhood from becoming completely colored in its racial structure (R. 69). Neither the lower court nor the Court of Appeals in their respective opinions made any reference to the foregoing evidence received by the Commission.

The opinion of the Court of Appeals of Maryland relies substantially upon the opinion of the lower court. Like the lower court, the Court of Appeals recognized the principle of *Shelly v. Kramer*, but thought it to be inapplicable because the Commission sought to disaffirm the clearly unlawful motives of the complainants. The Court stated that although it is well settled that one may own and sell property without regard to race, color, creed or religion, since the Commission early in the proceedings "stated" and "reiterated throughout the proceedings" that it was not concerned with block-busting, the constitutional issue was removed from the case.

The evidence which was offered by the appellants, when read together with the evidence which was rejected by the Commission, and by the lower court with the approval of the Court of Appeals, clearly demonstrates that the sole purpose of filing these complaints was to prevent the brokers from selling property to Negroes in formerly all-white neighborhoods by having their brokers licenses suspended. To argue, as the Court of Appeals has done in its

opinion, that the motives of the complainants in invoking the power of a State Administrative Agency are irrelevant to the question whether the proceedings resulting from such complaints violates the constitution of the United States, is sheer judicial nonsense.

It is of course correct that where a state statute is aimed at a substantial evil which the state has an interest to prevent, it is unimportant that the party who seeks the protection of the statute has ulterior motives. But it seems reasonably clear as illustrated by *N.A.A.C.P. v. State of Alabama*, 357 U.S. 449, 78 S. Ct. 1163, (1959), that when the motives of private citizens who invoke state power is to accomplish a purpose which the Fourteenth Amendment prohibits to the State itself, the evil sought to be prevented must be real and substantial as distinguished from trivial and technical. In the present case, there is no evidence whatsoever to show that any citizen suffered the slightest harm from the posting of the "Sold" sign or from the use of the listing agreement attacked in the complaint. The sole injury was to the imaginary rights of the complainants to live in a neighborhood which had no more Negroes than the complainants wanted. That the question in this case is a substantial one, is indicated by what has already been stated.

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APPENDIX A

Article 56 of Annotated Code of Maryland

Section 224. Suspension and Revocation of License.

(a) The Commission may upon its own motion and shall upon the verified complaint in writing of any person, provided such complaint, or such complaint together with evidence, documentary or otherwise, presented in connection therewith, shall make out a prima facie case, cause to be investigated the actions of any real estate broker or real estate salesman, or any person who shall assume to act in either such capacity within this State, and shall have the power to suspend or revoke any license issued under the provisions of this subtitle, at any time where the licensee has by false or fraudulent representation obtained a license, or where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

(b) Pursuing a continued and flagrant course of misrepresentation, or making of false promises directly or through agents or salesmen or advertising or otherwise, or

(c) Using any contract form for the listing of property for sale, rent or exchange or any contract form for the sale, rent or exchange of property or any advertising matter which includes the name of any association or organization of which the licensee is not a member, or

(d) Retaining the services of any person as a salesman on a purely temporary or single-deal basis as a means of evading the law regarding payment of commissions to non-licensed persons on some contemplated transaction, or

(e) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts, or

(f) Accepting a commission or valuable consideration as a real estate salesman for the performance of any of the acts specified in this subtitle from any person except the real estate broker named in his license, or

(g) Representing or attempting to represent any other real estate broker as a real estate salesman without the express knowledge and consent of the broker named in his license, or

(h) Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others, or failing to promptly furnish a duplicate copy of all listing contracts to sell or rent property or of any lease or contract of sale, when prepared by the licensee, to all parties to any such contracts or leases, or failure of such licensee to retain a copy of such contracts (except that nothing in this subsection shall be construed to authorize any such broker or salesman personally to prepare any such legal papers) or

(i) Disregard or violation of any provisions of this subtitle, or

(j) Any misleading or untruthful advertising, including advertising property for sale or for rent as an agent or broker without disclosing in such advertising the name of the advertiser or the fact that he is an agent or broker, or where any such advertising is published over the name of a licensed real estate salesman, failure to disclose in such advertisement the name of the broker whom such salesman is licensed to represent, or

(k) Paying or receiving any rebate, profit, compensation or commission in violating this subtitle, or

(l) Soliciting or inducing any party to a contract, lease or agreement to break such contract for the purpose of substituting in lieu thereof a new contract, lease or agreement where such soliciting or inducing is motivated by anticipated personal gain by the licensee, or

(m) Forgery, embezzlement, obtaining money under false pretenses, larceny, extortion, conspiracy to defraud, or other like offense or offenses, and who has been convicted thereof in a court of competent jurisdiction of this or any other State, or

(n) Guaranteeing, or having authorized or permitted any person to guarantee future profits which may result from the resale of real property, or

(o) Soliciting, selling, or offering for sale real property by offering "free lots" or conducting lotteries or contests, or offering prizes for the purpose of influencing a purchaser or prospective purchaser of real property, or advertising offering "free appraisals" unless the advertiser is equipped and stands ready to appraise real estate for any person requesting such an appraisal, free of charge, regardless of the purpose for which such appraisal is requested, or accepting a listing contract to sell property unless such contract provides for a definite termination date without notice from either party, or the acceptance of any such listing contract which provides for a "net" return to the vendor, leaving the licensee free to sell the property at any price he can obtain in excess of the "net" price named by the vendor, or

(p) Revocation of the license of a nonresident of this State licensed under the subtitle by the real estate commission of the state or district in which such nonresident licensee is a resident, provided the license commission so revoking a license has certified such action to the Maryland Real Estate Commission, and in such cases the Maryland Real Estate Commission shall have the right to revoke the Maryland license without hearing as provided in Section 225.

(q) Conviction by a court of competent jurisdiction of any licensee under this subtitle of any act which constitutes a violation of this subtitle; and that upon certification of such conviction by the court to the Maryland Real Estate Commission the Commission shall have the right to revoke license without hearing.

(r) Negligence, or failure to disclose or to ascertain and disclose to any person with whom such licensee is dealing, any material fact, data, or information, concerning or relating to the property with which such licensee is dealing, which such licensee knew or should have known, or

(s) Any act or conduct whether of the same or a different character than hereinabove specified which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent, or improper dealings.

(t) Any unlawful act or violation of any of the provisions of this subtitle by any licensee, shall not be cause for the suspension or revocation of a licensee of any licensee with whom the offender is associated in any manner whatsoever, unless it shall appear to the satisfaction of the Commission that the licensee or licensees with whom the offender is associated had guilty knowledge of such violation or violations. (An. Code, 1951, Sect. 231; 1939, Sect. 355; 1939, ch. 351, Sect. 297; 1941, ch. 391, Sect. 355; 1951, ch. 374, Sect. 355 (n-1), (n-2); 1955, ch. 631.)

APPENDIX B

Opinion Below

In the Court of Appeals of Maryland

No. 76, September Term, 1959

Manuel M. Bernstein, et al., etc.,

v.

Real Estate Commission of Maryland, et al.

Argued before: Brune, C.J., Henderson, Hammond, Prescott, and Horney, JJ.

Opinion by Horney, J.

Filed: December 18, 1959

This is the first appeal governed by the Administrative Procedure Act to reach this Court since its enactment by Chapter 94 of the Acts of 1957 [now codified as amended as Code (1957), Art. 41, Sections 244-256, inclusive].

On this appeal we are asked to review the orders of the Baltimore City Court affirming the findings and conclusions of the Real Estate Commission of Maryland (commission) that there was sufficient competent, material and substantial evidence to justify suspending the licenses of a broker and his associate.

The appellants are Manuel M. Bernstein (Bernstein) and Warren S. Shaw (Shaw), trading as Manning-Shaw

Realty Company (realty company or Manning-Shaw), often herein referred to collectively as "the brokers." They are cast on this appeal in two different "acts" of unethical misconduct, combined in one record. The first (in a four-pointed complaint) charged them with violations of Code (1957), Art. 56, Section 224(b), (j), (s) and (a), which prohibits [b] "a continued and flagrant course of misrepresentation," * * * [j] "misleading or untruthful advertising," * * * [s] "bad faith, incompetency or untrustworthiness, or dishonest, fraudulent, or improper dealings" by real estate dealers and salesmen or agents and (as applied here to Bernstein only) [a] the obtaining of licenses by "false or fraudulent representation." The commission concluded there had been violations of all of the charges except the last, as to which it declined to take any action at the time of the hearing. The complainants cross-appealed the refusal of the commission to act on the last point, but when the lower court sustained the action of the commission they did not appeal to this Court. The second charge (in a separate complaint) concerned a violation of §224(c) [of Art. 56], which forbids the acceptance of "a listing contract to sell property unless such contract provides for a definite termination date without notice from either party." The commission also found there had been a violation of this charge. At the conclusion of the hearing, the commission ordered a three months suspension of the licenses of the brokers in each case, to run concurrently.

The first complaint concerned the affixing of a "sold" sticker to a "for sale" sign placed on the property in Baltimore City known as 3800 Grantley Road and leaving it there for approximately three months. The gist of the complaint was that there had not been a bona fide sale of the property and that the sticker on the sign was a deliberate misrepresentation to induce property owners in the neighborhood to sell their homes and by immediate solicitation to induce them to use Manning-Shaw as brokers. The realty company countered by claiming that it held a contract of sale signed by Joseph Carter and wife (Carter or the purchaser), which had been executed before the sticker had been affixed to the sign, and that settlement

had been delayed because the purchaser had had difficulty in disposing of several other properties then owned by him.

The second complaint, as hereinbefore indicated, concerned the use of an illegal listing contract. The brokers, in denying that the contract contravened the statute, claimed that even if the statute had been violated it was not a wilful transgression.

In their positions for judicial review by the lower court, the brokers contended, among other things, that the complaints constituted an unlawful conspiracy against the civil rights of themselves and their customers in that, in substance, they were charged with "block-busting" and that the complaints were intended to prevent Negroes from purchasing and occupying homes of their own selection in violation of constitutional guarantees.

The first complaint, although denying any prejudice on the part of the complainants, did contain allegations that Manning-Shaw had specialized in sales of residential properties to Negroes in formerly all-white neighborhoods, that such practices were intended to promote panic and instability in the vicinity for the purpose of exploiting and capitalizing on such prejudices as did exist in order to obtain as many listings as possible and that such practices had adversely affected the morale of the residents and depreciated property values.

Whatever may have been the real motive of the complainants, the commission early in the proceeding before it made it clear, and continued to reiterate, that the hearing was for the sole purpose of determining whether or not Bernstein and Shaw had violated the law in connection with the exercise of their rights under the licenses issued to them, and that the commission was not concerned with "block-busting". Furthermore, we think the lower court was correct in refusing to receive into evidence, even as "explanatory background," the proffered exhibits with regard to publicity given the accusation. At the conclusion of the hearing on appeal below, the lower court found no basis in the record to believe the commission was either

biased or arbitrary in the manner in which it had conducted the proceeding before it. The question is not specifically before us on the appeal to this Court, and we shall not consider it further.

Since there are two separate and distinct causes we shall summarize the salient parts of the oral testimony and documentary evidence and the findings of fact in each before discussing the questions presented.

The 3800 Grantley Road Case

On June 19, 1958, Carter and his wife entered into a contract to purchase this property from the Eutaw Realty Corporation, the capital stock of which was owned equally by Bernstein and Shaw, who, as herein stated, are partners in Manning-Shaw, the brokers in the transaction. It is this contract that is the main topic of this litigation. The property was sold for $18,000 subject to an annual ground rent of $120. According to the terms of the contract $500 had been paid prior to its execution, $550 was payable within two days and $1,950 on or before the expiration of thirty days. The balance of $15,000 was to be financed by a standard land installment contract with weekly payments of $37.50.

Carter was making only $54.62 a week but claimed his income was $70. His wife, who had an undetermined number of children, was employed as a domestic. At the time the contract was signed, the purchaser had small equities in several other properties. Through Manning-Shaw, also acting as brokers, he had previously placed a $500 deposit on another house under a contract still in effect when the Grantley Road contract was made. Shaw claimed it was understood that the prior contract had been canceled, bu there was testimony that Carter and his family claimed it as their "home" for sometime after June 19. Manning-Shaw produced mortgage loan applications to show that loans had been applied for and rejected shortly after the contract for 3800 Grantley Road had been executed. The $500 allegedly paid prior to the signing of this contract was a credit transaction on the books of Manning-

Shaw for that amount held in escrow by them as a deposit on the previously executed contract for the other property. Carter, however, paid $550 on June 21, 1958, and $850 on September 13, 1958. These transactions were verified by ledger entries in the bank account of Manning-Shaw.

The complainants, who resided across the street from and next door to 3800 Grantley Road, testified that after the "sold" sticker had been affixed to the sign nothing seemed to be done with respect to the property and that it appeared to be unoccupied. On one occasion another neighbor saw Carter doing some work around the house and upon advising him that the electricity should be turned on to provide current for the sump pump, he replied that "he would see the boss." Carter also stated, according to the neighbor, that he did not know who had bought the house. A woman police sergeant testified that when she had gone to the property on January 31, 1959, and on subsequent visits, she found Carter's wife and eight children occupying the kitchenette where a gas stove afforded the only heat in the house. Hunger and lack of clothing were also noted. But a photograph, introduced by Manning-Shaw, showed Carter sitting with Shaw in a well furnished living room in the house.

There was also evidence that the sales agent who had made the sale had not, as late as the end of 1958, received a commission on the sale although both he and the realty company admitted a commission was due him. Manning-Shaw claimed they paid the salesman through a drawing account and in round figures not in specific commissions. But their records indicated that previously he had been paid exact commissions by them for the specific properties which he had sold.

Another witness, posing as a buyer after placement of the "sold" sticker, had been informed by another sales agent of Manning-Shaw that the property was not sold at that time. Manning-Shaw claimed the agent had said the sale might not go through and that the prospective "buyer" could have it if the pending sale was not consummated.

On this evidence the commission made five findings of fact to the effect: (i) that the sales agent had not received a commission for making the sale; (ii) that another agent had offered to sell the property to a prospective buyer two months after the purported sale had been made; (iii) that the purchaser was still under contract to purchase another property through the same brokers when he purportedly purchased 3800 Grantley Road; (iv) that there were several unexplained discrepancies between the purported contract of June 19 and the transaction allegedly consummated on September 19, in which the required down payment was made less and the weekly payments were made smaller; and (v) that there had not been a normal occupancy of the property by the purchaser. The commission further found that it was difficult to give credence to the explanations of Bernstein and Shaw; that the testimony of Shaw, who was most familiar with the transaction, was vague and indefinite; and that the testimony of Carter was contradictory and inconsistent and entitled to little weight. Therefore, the commission, having concluded that the alleged sale was not bona fide, found the brokers had violated 224(b) of Art. 56 [continued and flagrant course of misrepresentation], (j) [misleading and untruthful advertising] and (s) [bad faith and improper dealing].

Section 255(g) of Article 41, *supra*, provides:

"The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court; or

(7) Unsupported by the entire record, as submitted by the agency and including de novo evidence taken in open court; or

(8) Arbitrary or capricious."

While it appears that the scope of judicial review by a trial court of the findings, inferences, conclusions and decisions of administrative agencies under the statute has been broadened to some extent, it is clear that the statute did not intend that the court should substitute its judgment for the *expertise*[1] of those persons who constitute the administrative agency from which the appeal is taken. Cf. *Maryland Racing Commission v. McGee*, 212 Md. 69, 80, 128 A. 2d 419, 425 (1957). See also *Marino v. City of Baltimore*, 215 Md. 206, 222, 137 A. 2d 198, 205 (1957).

Generally, when the entire record shows that the findings of fact and conclusions of law are supported by competent, material and substantial evidence taken before the agency and such *de novo* evidence, if any, as may be taken by the court, and such findings and conclusions are not against the weight of such evidence, it is the function of the court to affirm the order of the agency or remand the case for further proceedings if that be necessary. On the other hand, if the court should find that the substantial rights of a petitioner for review have been prejudiced, by one or more of the causes specified in §255(g) (1)-(8) of Art. 41, because of an administrative finding, inference, conclusion or decision, when it is the function of the court to reverse or modify the order.

In this case 3800 Grantley Road, the brokers contend that the exercise by the commission of its statutory func-

[1] The statute [Sec. 252(d)] specifically provides that agencies "may utilize their experience, technical competence and specialized knowledge" in evaluating the evidence.

tions was against the weight of the evidence in that they claim the affirmative evidence of good faith — shown by the execution of the original contract and final consummation of the substituted transaction made three months later, the payments on account of the purchase price and the declined applications for mortgage loans — could not be overcome by the showing of "negative" evidence of bad faith, or the inference deducible therefrom. They further contend that the weight of such evidence did not support the conclusions of law reached by the commission.

Ordinarily it is true, of course, that when the bona fides of a *formal* contract is attacked for the purpose of having it cancelled or modified, the burden to show that it was not made in good faith is upon those who attack it. *Abrahams v. King*, 111 Md. 104, 111, 73 Atl. 694, 696 (1909). It is also true, as it is in court proceedings, that the burden of proof is generally on the party asserting the affirmative of an issue before an administrative body. 42 Am. Jur., *Public Administrative Law*, §131. Thus, in this case, there is no doubt that the complaining property owners had the burden throughout of proving the alleged violations of the prohibitory provisions of the real estate "code." 2 Davis, *Administrative Law*, §14.14 (1958). But we are of the opinion that the complainants sufficiently met that burden.

In a case such as this, where it was the bona fides of the acts of the real estate brokers which was under attack — not for the purpose of canceling or modifying the contract but for the purpose of showing the brokers had misrepresented the transaction by claiming the contract was valid when in fact it was not — there was no reason why the commission in the exercise of their skill and judgment, as they were specifically empowered to do by §252(d) of Art. 41, should not also consider, together with the positive evidence, the so-called negative evidence — that the sales agent had not been paid his commissions; that the purchaser with limited means was still bound at the time under a previous contract to purchase another property; that the discrepancies between the original contract and the substituted transaction were not explained; and that there had

not been a normal occupancy of the premises — and the inferences deducible from such negative evidence. There was also no reason why the commission could not consider the circumstances of the parties, their credibility as witnesses, the dealings between them prior to the execution of the contract of sale and their subsequent acts and declarations, in deciding whether or not the brokers had violated one or more of the prohibitory provisions charged in the complaint. Moreover, there was also the positive testimony of a neighbor to the effect that the purported purchaser, after the date of the purchase, had denied buying the property and, on the same occasion, had referred to the brokers, or one of them, as his "boss," as well as the positive testimony of the prospective "buyer" to the effect that another sales agent had shown him the property as being for sale when it had purportedly been sold, which evidence, though disputed the commission may well have believed. Furthermore, under the facts and circumstances in this case, the commission was not obliged to accept the explanations of Bernstein or of his associate, with respect to the bona fides of the transaction.

The statute specifically provides that an administrative agency "may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs." Section 252(a) of Art. 41. There was no contention that the evidence in question did not meet this test. With respect to the weight of the evidence, it is true, of course, that a mere surmise or conjecture that it was sufficient would not be enough. The comparative degree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, *i.e.*, a preponderance of the evidence is necessary, but proof beyond a reasonable doubt is not required. 42 Am. Jur., *Public Administrative Law*, Section 132.

On the record from the commission in this case, the trial court found that the findings and conclusions of the commission on the evidence before it were not arrived at in contravention of the standards stated in paragraphs

(5), (6) or (7) of Section 255(g), *supra*, and that such evidence supported the decisions of the commission. We think the record sustains the trial court. The order of the lower court in the 3800 Grantley Road Case will therefore be affirmed.

The brokers also complained that the lower court erred in not receiving the proffered documentary proof that a commission had been paid for making the sale. Such additional evidence is not receivable unless the court is satisfied that it is material and that there were good reasons for failure to prevent it in the proceeding before the agency. Section 255(e) [of Art. 41]. But, even if we assume, without deciding, that it should have been received as *de novo* evidence, it would not have destroyed, even if it had been believed by the court, the effect of the other findings of fact on which the commission also based its conclusions of law.

The Listing Contract Case

This case involves a mere concise factual background. The complainant, an incorporated improvement association, charged that Manning-Shaw had used an illegal listing contract in violation of Section 224(e) [of Art. 56], *supra*. The offending clause in the contract read:

> "The owner reserves the right to withdraw the property from said agent at any time after six months. But it is understood that this [a]greement is not revokable while any negotiations are pending for sale or exchange of the property. And if the property is sold or exchanged subsequently to any party with whom said agent has been negotiating, the commission will be paid to said agent."

In their answer to this charge, the brokers claimed that even if the contract was not proper — in that it did not provide for a definite termination date "without notice from either party" as the statute requires — the violation was not willful. In refutation of that claim the former

secretary of the commission testified that Bernstein had been to his office sometime during the year 1956, primarily on another matter, and that, while he (the secretary) could not recall having seen a Manning-Shaw listing contract without an expiration date, that he was certain that he had warned them that all listing contracts must have a termination date since it was his policy to tell everyone who asked him about the matter that a definite expiration date must be included in order to comply with the law. Bernstein admitted that his firm knew that the law had been recently changed to require a termination date.

The commission found that the brokers had knowledge that their listing contract did not comply with one of the provisions of Section 224(e) [of Art. 56].

When the appeal from the commission in this case reached the court below, the brokers applied for leave to present additional material evidence. The court ordered that such evidence be taken in open court. It was to the effect that Shaw had sent the commission samples of their listing contracts and other forms in a letter dated January 19, 1957, in connection with a complaint dealing with a different matter, the inference being, we assume, that the commission had not then or thereafter objected to the legality of their listing contract.

In this case [Listing Contract], the brokers now contend that their listing contract was a good one and that the statute does not require the use of words "termination" or "terminate" if that part of the contract binding on the seller is in fact terminated by the language used, which they insist their contract did. They further contend that the order of the commission suspending their licenses for this technical violation was arbitrary and capricious since the violation had harmed no one.

The short answer to those contentions is that the statute specifically requires that a listing agreement *must* contain "a definite termination date *without notice from either party*" [emphasis added] and that since there was a clear-

cut violation of the statute, the suspension of the licenses, under the existing facts and circumstances, was not either arbitrary or capricious.

The trial court found that there was competent, material and substantial evidence in the entire record as submitted including the *de novo* evidence taken in open court — not overcome by countervailing evidence — to support the commission's finding of fact and conclusion of law to the effect that the brokers had violated one of the provisions of Section 224(e) of Art. 56. We agree. Since the order of the lower court in the Listing Contract Case was proper, it will also be affirmed.

ORDERS AFFIRMED IN BOTH CASES, THE APPELLANTS TO PAY THE COSTS.

OPINION OF LOWER COURT

(Filed June 4, 1959)

In The Baltimore City Court

Manuel M. Bernstein and Warren S. Shaw, t/a Manning-Shaw Realty Company,

Petitioners

v.

J. Dyas, Chairman, et al., constituting the Real Estate Commission of Maryland, and Allen Kleiman and Jeannette Kleiman, his wife, and Bernard Cherry and Dora Cherry, his wife,

Respondents

Same,

Petitioners

v.

J. Dyas, et al., constituting the Real Estate Commission of Maryland, and Allendale-Lyndhurst Improvement Association,

Respondents

and Cross Appeal

These proceedings are brought under the Administrative Procedure Act (Code, 1957, Art. 41, Sec. 244-256), for review of two separate orders of the Real Estate Commission of Maryland (the Commission) dated April 21, 1959, suspending the broker's license of Manuel M. Bernstein and the associated broker's license of Warren S. Shaw for a period of three months. In the first matter, the Commission found that Bernstein and Shaw, trading as Mann-

ing-Shaw Realty Company, engaged in a continued and flagrant course of misrepresentation in violation of Section 224(b) of Article 56 of the Code (1957), that they have engaged in misleading and untruthful advertising prohibited by Section 224(j), and that their conduct constitutes and demonstrates bad faith and improper dealings in violation of Section 224(o). In the second proceedings, the Commission found that Bernstein and Shaw violated 224(o) by knowingly permitting the use of a listing agreement without providing for a definite termination date without notice from either party. A suspension of three months was ordered in each case, to run concurrently. The complainants in the first matter before the Commission have filed cross-appeals.

The complaint on which the first order was based concerned the placing of a "Sold" sign on the property in the northwest section of the City known as 3800 Grantley Road by the Appellants in the latter part of June, 1958, and maintaining it until some time in September of the same year. The complainants (with the Commission Appellees herein) are the owners of the properties known as 3801 and 3802 Grantley Road. Their complaint, filed with the Commission on September 5, 1958, alleges, *inter alia*, that there had been no bona fide sale of the house, and that the affixing of the "Sold" sign was a deliberate misrepresentation to induce other property owners in the neighborhood to sell their homes and to use Manning-Shaw as brokers. An answer was filed by Manning-Shaw on September 29, 1958, denying the allegations of the complaint, stating that there was in fact a contract of sale for 3800 Grantley Road to one Joseph Carter and his wife, executed on June 19, 1958, and further alleging that settlement had not taken place because of difficulty encountered by the Carters in disposing of property owned by them.

The complaint also alleged that Manuel M. Bernstein, one of the Appellants herein, had made repeated false statements to the Commission in his application for licenses as a real estate salesman and as a broker in that in his applications he had answered the question as to whether

he had been convicted at any time within the past five years of forgery, embezzlement, obtaining money under false pretenses, etc., in the negative, when in fact he had pleaded guilty in the United States District Court for the District of Maryland, on October 14, 1949, to an indictment of five counts charging him with defrauding the United States of America. Bernstein denied the charge. In its order, the Commission stated that it felt that it should not take any action at this time regarding the charge of misrepresentation in the application for a license, and therefore made no findings in respect thereto. The cross-appeal of the original complainants is taken from this portion of the Commission's decision.

The second complaint before the Commission was filed by the Allendale-Lyndhurst Improvement Association, Inc. on October 9, 1958, and was based upon the alleged use of an illegal form of listing agreement by the Appellants. The two matters were heard by the Commission separately, on February 3, 4, 24 and 25, 1959. Briefs were submitted and oral arguments were heard on March 24. The transcript of the testimony and arguments in the two matters comprises over 900 pages, in addition to numerous exhibits. Both petitions of review asked for a stay. After hearing counsel on April 28, 1959, this Court passed an order the following day, setting the cases for hearing on the merits on May 8, and staying the legal operation and effect of the Commission's orders until the determination by this Court of the Appellants' petition and proceedings for review. The hearing was postponed to May 11. On that day, the Court, for reasons given orally, denied two of the Appellants' petitions for the taking of additional testimony but granted the third petition in part in respect of the second case dealing with the alleged improper listing agreement. Testimony was taken in open court to the extent permitted by the ruling and the cases were argued the same day.

In both their petitions for review, the Appellants contend, *inter alia*, that the complaints are part of an unlawful conspiracy against the civil rights of the Appellants and their customers, in that in substance the Appellants

are charged with the alleged crime of "blockbusting" when there is no such offense, that the action by the Appellees was the result of prejudice and discrimination and was intended to prevent Negroes from purchasing and occupying dwelling houses of their own selection contrary to and against the provisions of the United States Constitution, the decisions of the Supreme Court of the United States and the Court of Appeals of Maryland.

The complaints of the Kleimans and the Cherrys contain allegations that the Manning-Shaw Realty Company, a partnership in which Bernstein and Shaw are the partners, has specialized in the sale to Negroes of residential property in formerly all-white neighborhoods, and that these practices are for the promotion of panic and instability in such neighborhoods with a view of exploiting and capitalizing on certain attitudes and prejudices in order to obtain as many listings as possible; and that such practices adversely affect the neighborhood's morale and depreciate property values. The complainants further alleged that they have no objection to or prejudice toward Negro neighbors and have satisfactory relationships with such neighbors living close by although not in the same block, but that they object to the practices of Manning-Shaw, including the alleged misrepresentations and false dealings, which are calculated to and in fact result in the conversion of neighborhoods from all-white to all-Negro occupancy.

The right to acquire, enjoy, own and dispose of property is a civil right protected from discriminatory action by the Fourteenth Amendment to the United States Constitution. *Shelley v. Kraemer*, 334 U.S. 1, 92 L. ed. 1161; *Barrows v. Jackson*, 346 U.S. 249, 97 L. ed. 1586. As the Supreme Court has pointed out, equality in the enjoyment of property rights regardless of race or religion is one of the basic civil liberties which the Fourteenth Amendment was intended to guarantee. The equal protection clause of the Fourteenth Amendment to the United States Constitution prevents judicial enforcement by state courts of restrictive covenants in deeds for real property based on race or color. *Goetz v. Smith*, 191 Md. 707.

The power of the Commission to suspend or revoke licenses is limited to action with respect to the specific offenses set forth in the statute. Actions lawful in themselves cannot be made illegal or the ground of disciplinary action because of their possible effect upon the nature of a residential occupancy of a neighborhood or the social habits and personal desires of its inhabitants. On the other hand, if conduct is proved to constitute misrepresentation, untruthful advertising or bad faith, it cannot be justified because one of the ends it may accomplish is in itself legal.

Entirely apart from the questions to be hereafter considered as to the sufficiency of the evidence to sustain the Commission's order, the record clearly demonstrates that in its proceedings the Commission had these fundamental principles in mind. Early in the proceedings, one of the commissioners stated, "This is a hearing, as I understand it, for the purpose of determining whether or not this broker has violated the law in connection with the exercising of the rights of his license. We're not concerned with block-busting, as so far defined. If there is anything fraudulent in the way a listing is procured or a sale has been executed, that's what we want to hear. We're not going to rule; we're not going to be concerned with whether a house was sold to white or colored that's besides the point. The question is whether it's properly represented or properly sold or of the mechanics of the transaction were properly handled, regardless of whether it was between two white people, two colored people or between a white and a colored person. So, now let's not get off on racial issues or even try to bring them into the case because we're not going to rule on them." The Commission repeatedly made clear that its only concern was with the allegations of specific violations of the statutory prohibitions. It refused to consider or even read articles offered in evidence by the Appellants dealing with the general subject of changing neighborhoods and the objectives of the improvement association which filed one of the complaints because, as the Commission reiterated, it was concerned only with

truth or falsity of the charges of false and misleading advertising, bad faith and misrepresentation. I find no basis in the record for the Appellants' allegations of bias and arbitrariness on the part of the Commission.

The 3800 Grantley Road Case

This property had been acquired by the Eutaw Realty Corporation by deed on May 20, 1958. The stock of the Eutaw Realty Corporation is equally owned by the Appellants Bernstein and Shaw. The Manning-Shaw Realty Company is a partnership in which Bernstein and Shaw have equal interests. Manning-Shaw affixed a "For Sale" sign on the Grantley Road property in May or June of 1958. On June 19, 1958, the contract of sale the validity of which is herein attacked was entered into between the Eutaw Realty Corporation, as seller, and Joseph Carter and Marie Carter, his wife, as buyers. The purchase price was $18,000.00, subject to an annual ground rent of $120.00. The contract recited that $500.00 had been paid prior to the signing, and that the balance was to be paid as follows: $550.00 within two days of the date of the contract, $1,950.00 on or before thirty days of that date, the balance of $15,000.00 to be financed through a standard land installment contract between the buyer and seller, providing for payments of $37.50 a week. It was provided that settlement was to take place within thirty days of the date of the contract. George Straughn, a salesman for Manning-Shaw, witnessed the signatures of both the seller and the buyers.

At the time the contract was entered into, Joseph Carter was employed by the Brooks-Price Company as a porter. His duties consisted of keeping the service department presentable and delivering mail to the post office. His average weekly earnings during 1958, according to the records of his employer, were $54.62 a week, with overtime on only one week, although Carter testified that he was earning around $70.00. His wife works as a domestic, and he has a large family of young children, as to whose number he made various conflicting statements. At the time Carter

signed the contract, he was living at 2531 Madison Avenue the title to which was in his name but which was subsequently sold when Carter defaulted on the mortgage payments. He testified that he had no equity in the Madison Avenue property, and received nothing from the foreclosure sale but that he had an squity of several thousand dollars at the time he signed the contract in 2511 Ellamont Road and 2434 West Lafayette Avenue. He, as well as the Appellants, testified that Manning-Shaw was endeavoring to sell these properties for Carter. Carter testified that if they were sold he would have had sufficient money to put down on the Grantley Road property. Shaw testified that Carter had come to his office some time in January, and that Straughn had begun to show him, Carter, houses for sale. Shaw was informed that Carter had to sell three properties in order to buy another house. Straughn, Manning-Shaw's salesman, testified that Carter had told him he was a mechanic, and evidence was offered that at the time of the signing of the June 19 contract Carter was driving a 1957 Ford. Several days after the contract was signed, the "Sold" sign was placed on the property and remained on it until after the Kleimans and Cherrys filed their complaint with the Commission on September 5.

Manning-Shaw had had previous dealings with Carter with respect to the purchase of another house. On January 20, 1958, a contract of sale had been entered into for the premises 3500 Ellamont Road between Mr. and Mrs. Havelock, the owners, and the Carters. Manning-Shaw was the broker and Straughn, their salesman, was one of the witnesses. The purchase price was for $18,000.00, subject to an annual ground rent of $120.00. $500.00 was paid prior to the execution of the contract the balance was to be paid in cash on the date of settlement, conditional upon the buyers obtaining a conventional mortgage in the amount of $13,000.00. The contract contained the following clause:

> "The buyers have a right to cancel this contract within sixty (60) days from the date of this contract by the giving of notice in writing to the sellers. If

such notice is not given, settlement shall be held within 180 days from the date of this contract. In the event such notice is given within sixty (60) days from the date of this contract, the deposit shall be refunded."

The Havelocks were represented by Mr. C. Morton Goldstein. Neither Mr. Goldstein nor his clients received any notice of cancellation by the Carters within the sixty day period. Goldstein testified that late in May of 1958, the Havelocks received a letter from Manning-Shaw stating that they had the $500.00 deposit in escrow. In June, Shaw informed the Havelocks that the Carters did not intend to meet settlement on the Ellamont Road property. On June 26, Goldstein wrote Shaw that his firm would be held accountable for the deposit. Straughn asked Goldstein for an extension of the contract. After Straughn's request, Goldstein prepared a draft of an extension of the settlement date, which was not signed. Goldstein testified that on July 24, Straughn told him that Carter did not wish to have the Havelocks live in the Ellamont Road property rent free after the settlement. It was not until July 24 that Goldstein wrote to Carter and to Manning-Shaw declaring the contract at an end and the deposit forfeited.

Mrs. Havelock testified that Carter came out to the Ellamont Road property many times in June and July with one or more of his children and showed them what he referred to as "our house." On August 13, Manning-Shaw procured another contract for the purchase of 3500 Ellamont Road with Mr. and Mrs. Jones as buyers, which was consummated on September 12, but Mrs. Havelock testified that as late as August 13 when the new contract was about to be signed, Carter walked into the Havelock's living room and would not leave. There was conflicting testimony by the Appellants to the effect that they regarded the Ellamont Road contract as no longer in effect by the end of March, 1958, and assumed that the Havelocks did likewise.

The Commission in its order of April 21, 1959, found as a fact that the contract between the Havelocks and the Carters for the purchase by the Carters of 3500 Ellamont

Road was in full force and effect at the time that the purported contract of June 19 for the purchase of the Grantley Road property was signed.

Although the deposit made by Carter on the Ellamont Road property had been declared forfeited and the sum in that amount was eventually received by the Havelocks largely through a deduction from the commission due to Manning-Shaw on the resale of the property, Shaw testified that Carter's deposit on the Ellamont Road property had been transferred to the deposit on the Grantley Road property, recited in the June 19 contract.

Shaw testified that when Carter originally came into his office he represented that he had an equity of $5,000.00 in three properties which he owned, and that when Shaw first met Carter he, Shaw, was quite impressed with him as a deliberate, independent buyer. However, Mrs. Havelock testified that in July she called Shaw and asked him if he had run a credit check on Carter, that Shaw said he had not, but that later in July Shaw told her that he had run his own retail credit check on Carter, that he was "terribly sorry about all this," and apologized because Carter was a "deadbeat" who had wasted his, Shaw's, time as well as that of the Havelocks.

After the "Sold" legend had been affixed to the Manning-Shaw sign on the Grantley Road property, the Kleimans and Cherrys, who owned houses next door and opposite 3800 Grantley Road, observed no one was living in the house and that apparently nothing was being done in it. Bernard Cherry, one of the Appellants, who lives at 3802 Grantley Road next to 3800, testified that after the "Sold" sign was placed on the 3800 lawn, he observed a man, whom he afterward found to have been Carter, doing some jobs around the house. Cherry told Carter that he had better tell Manning-Shaw to turn on the electricity because the sump pump in the basement was not running and the cellar would become wet, and that Carter said "he would tell the boss." Cherry asked Carter who had bought the property and testified that Carter replied he could find out the name but did not know.

On June 24, 1958, Manning-Shaw applied to Mr. J. Calvin Carney for a mortgage loan on 3800 Grantley Road, giving a description of the property, and stating that the sales price was $18,000.00, ground rent $120.00, that the buyer was paying $3,000.00 down and "we'll need a mortgage of $15,000. We wish this amortized at ten cents a share." Carney took up the matter with building associations which he represented, which passed the proposed mortgage loan in various amounts, the largest being $10,000.00. Shaw testified that these amounts were not acceptable. When asked during the proceedings before the Commission what was the purpose of trying to get mortgage financing when the contract provided it should be financed by way of a land installment contract, Shaw replied that the payments under the mortgage, which might possible go through, would be approximately $50.00 a week; that he had discussed the situation with Carter and Carter said he knew he could get a mortgage; that he, Shaw, knew it was practically impossible to get the kind of mortgage that Carter's circumstances would have required, but he made the effort for Carter's benefit.

David F. Riddick is employed as manager of a cafe owned by the secretary of the Ashburton Association and her husband, Mr. and Mrs. Turk. The Kleimans and Cherrys are also members of the association. Turk asked Riddick if he would be willing to look at the house on Grantley Road. Riddick called Manning-Shaw and asked Holmes, another of Manning-Shaw's salesmen, to see the property, and was taken to it by Holmes. The "Sold" sign was on the property; the visit, from Mr. Riddick's affidavit filed with the complaint and referred to in the testimony, was apparently made in the latter part of August. Riddick asked Holmes about the "Sold" sign, and said "This house is sold." Riddick testified that Holmes replied "No, that is all right, we have a reason for putting that there." Holmes and Shaw denied Riddick's statement about what had been saaid about the "Sold" sign. The house was inspected by Riddick. Holmes took Riddick to Manning-Shaw's office, where they waited for Shaw. According to Riddick, Shaw asked him how much money he had to put down. Riddick replied

he had $5,000.00 and Shaw said he would put him in the house that weekend and would make arrangements for the financing later. Riddick further testified that he talked to Shaw about the "Sold" sign, and that Shaw replied somebody had made a down payment on the house but "he was figuring on selling his house and the deal didn't go through, or something, so that house was free to be sold." Holmes testified that he told Riddick the property was sold and had shown him the house because it was vacant, and told him, Riddick, he would bring him back to the office and call Shaw for verification. Holmes said that at this interview both he and Shaw repeated the property was sold and there was a contract, and Shaw testified to the same affect. Shaw further testified that he informed Riddick that when they have a transaction that "begins to get a little shaky . . . we absorb every new prospect . . . in case something falls through." He testified he informed Riddick that within a week or so he would know whether or not the transaction would be consummated. Admittedly, Riddick was not a bona fide purchaser. He testified he did nothing further. Holmes testified that a week after the conference between him, Riddick and Shaw, he, Holmes, went back to Riddick's place of employment and asked him if he was still interested in buying the house, and that Riddick replied he did not know.

In addition to the transfer of the deposit of $500.00 previously made by Carter on the Ellamont Road property, the books of Manning-Shaw show a deposit of $550.00 made by Straughn on the 3800 Grantley Road property on June 21, 1958, and that a further deposit in the amount of $850.00 was made by Straughn on 3800 Grantley Road on the account of Carter on September 13, 1958.

Manning-Shaw's salesmen are paid only on a commission basis. Shaw testified that when Manning-Shaw acts as broker for the Eutaw Realty Corporation, the commission is 2½ per cent of the leasehold, less 10 per cent. These commissions, Shaw testified, are paid to the salesmen of Manning-Shaw on sales for the Eutaw Realty Corporation, and are not charged back to the salesmen even if the buyer

defaults. Straughn admitted that he had never been paid, credited for or drawn any advance on commissions on the purported sale of the Grantley Road property, and that as of the end of 1958 he had no commission on this property which he would report on his Federal income tax return. The Appellants contend that soon after the filing of the complaint in this case, the Internal Revenue Service of the United States Government began an examination of the Manning-Shaw records and books, which consumed a number of months and interfered with the keeping of their books during the period. They contend that while no credit was made on Straughn's account for a commission on the sale of 3800 Grantley Road, books were incomplete and not up to date. Shaw and Straughn both testified that Manning-Shaw has agreed to pay Straughn the usual commission on the Grantley Road sale, although at the time of the hearing before the Commission Straughn had not yet been credited for the amount due him. Shaw also testified that Straughn is not paid his commission after each sale, that he is one of Manning-Shaw's best salesmen, that checks are issued to him sporadically, in round figures, whenever he needs money, and that his commissions are figured and credited against his drawings. However, there were introduced in evidence photostats of nine checks of Manning-Shaw to Straughn, all issued between August 27 and September 26 of 1958, in varying amounts, all but one of which are marked as commissions for specified properties. The Commission found as a fact that Straughn received no commission or credit for a commission out of the Grantley Road transaction, although he normally would have been entitled to a commission.

On August 28, 1958, Carter made an application to the West Baltimore Building Association for a mortgage loan on the Grantley Road property in the amount of $16,000.00, subject to a hypothecation of $4,000.00. The association approved the loan in the amount of $16,000.00, subject to the $4,000.00 hypothecation and subject to a satisfactory credit rating. The loan was subsequently rejected by the association because the credit information received was unsatisfactory.

On September 19, 1958, after the complaint had been filed, a standard land installment contract was entered into between the Eutaw Realty Corporation and the Carters for the purchase by the Carters of 3800 Grantley Road at the price of $18,000.00, subject to an annual ground rent of $120.00. The contract stated that $2,000.00 had been paid on account by the buyer, leaving a principal balance due of $16,000.00, which was to be paid, with interest of 6 per cent per annum, through weekly installments of $40.00.

Sergeant Viola Hill White of the Baltimore City Police Department testified that on January 31, 1959 she had gone to 3800 Grantley Road on a complaint of Mrs. Carter against her husband. She testified she found eight children and the mother confined to the kitchenette, that the only heat in the house was that afforded by a gas stove in the kitchenette, that there was no oil, that she made several visits and observed extreme hunger and need for clothing on the part of the children, and that the refrigerator was empty. Pictures taken on behalf of the Appellants in February of 1959, after Sergeant White's testimony, show a well furnished living room and dining room. The Commission, in one of its findings of fact, stated:

> "The unimpeachable testimony of Sergeant White of the Baltimore City Police Department convinces the Commission that there was not a normal occupancy of the dwelling at 3800 Grantley Road because Sergeant White found the entire family living in the kitchen area without heat during the winter."

Although Carter testified that he regarded 3800 Grantley Road as his residence, the records of the Brooks Price Company, for which he has worked during the entire period in question, show his places of residence as 2434 West Lafayette Avenue, then 2531 Madison Avenue, and, as of February 20, 1959, 2028 North Payson Street.

There was testimony that apart from the possible social and economic effect of the placing of a "Sold" sign on the property in question, Manning-Shaw had a direct and personal financial incentive for the placing of the sign, particu-

larly with respect to the prospect of obtaining other houses for sale in the same neighborhood. If the sale was made in good faith, it is immaterial that Manning-Shaw had a financial advantage in advertising that they were responsible for it. Malcolm Sherman, an experienced realtor and former director of the Real Estate Board, testified that a broker generally puts a "Sold" sign on the property when the contract is signed by buyer and seller, even in cases contingent on financing.

Shaw and Straughn testified that both the contracts of June 19 and September 19 had been made in good faith. When asked, on cross-examination, whether he had intended to hold Carter to the contract, Shaw replied, "I say ninety-nine and a half per cent of all contracts are consummated. So, why shouldn't I have faith in people. I don't tie them up with a contract prepared by a lawyer." In its order, after its findings of fact, the Commission gave its conclusion as to the credibility of the Appellants and Carter as follows: "In addition to the above reasons, the Commission finds it difficult to give credence to the explanations of the Respondents and to the testimony of Mr. Carter. The Respondent Shaw, who was more familiar with this transaction, was very vague and indefinite in his testimony. The witness Joseph Carter contradicted himself and was quite inconsistent, therefore, little weight should be given to his testimony."

Section 255(g) of the Administrative Procedure Act provides that the Court may reverse or modify the decision of the agency if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> "(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> "(6) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court; or

"(7) Unsupported by the entire record, as submitted by the agency and including de novo evidence taken in open court: . . ."

The scope of administrative review of the findings of fact of the agency under the Act is broader than in the judicial review of the proceedings of other agencies excepted from the provisions of the Act. See, e.g., Unemployment Insurance Law, Art. 95A, Sec. 7(h); Workmen's Compensation Act, Art. 101, Sec. 56(a). Nevertheless, it clearly is not the intent of the Act, if the agency's findings are supported by substantial evidence in view of the entire record and not against the weight of the evidence, that the Court shall substitute its own judgment, whatever it may be, for that of the judgment of trained and specialized experts.

The Appellants contend that the Commission's findings require reversal under sub-sections 5, 6 and 7 of Section 255(g). They point, *inter alia*, to what they claim is the affirmative evidence of good faith shown in the execution of the two contracts of June 19 and September 19, the applications made to building associations for loans on the property, and the payment of $2,000.00 on account of the purchase price by Carter for which Carter is given credit in the contracts, supported to the extent of at least $1,900.00 by Manning-Shaw's records.

When the bona fideness of a formal contract is attacked, the burden to show that it was not made in good faith is upon those who attack it. *Abrahams v. King*, 111 Md. 104, 111. The Commission had the right to consider, as it did, the circumstances of the parties, their credibility, the dealings between them prior to the contract's execution, and their subsequent actions. Manning-Shaw had had dealings with Carter for some months prior to June 19, and although Carter claimed to have and indeed did have small equities in several properties, there is ample evidence in the record from which the Commission was justified in finding that Manning-Shaw knew of his limited earnings and lack of ability to meet the payments required. Straughn, Manning-Shaw's salesman, was the agent in a prior sale,

to Carter of another substantial house at 3500 Ellamont Road, the purchase price of which was also $18,000.00, subject to an annual ground rent of $120.00. While the issue was in dispute, there was substantial evidence, on which the Commission was justified in making its finding, that on June 19 the Ellamont Road contract was still in effect.

The testimony as to the occurrences after June 19 was found by the Commission to shed a strong light on the alleged bona fideness of the original transaction. The Commission emphasized that Straughn, the agent who reportedly made the sale, contrary to the usual procedure, never received any commission or credit for commission out of the transaction. The Commission also referred to several discrepancies between the June 19 contract and the actual transaction. The contract called for a down payment was made less and the weekly payments were made smaller. The Commission cited the "unimpeachable testimony of Sergeant White" to show that there was not a normal occupancy of the dwelling by the Carters, and the records of Carter's employer show that he never indicated the Grantley Road house as his residence.

These strong indications of the lack of bona fideness of both contracts are supported by other evidence, which while disputed, the Commission may well have believed, such as the testimony of a neighbor that Carter had denied after June 19 that he had bought the property, and that he referred to Manning-Shaw as his "boss." Riddick was not a bona fide purchaser, and admittedly was sent as an agent of the complainants to investigate the situation, but it was for the Commission to weigh the credibility of his corroborative testimony. Carter's testimony, in his several appearances before the Commission, was clearly contradictory and inconsistent, and the Commission who saw and heard the other witnesses during the protracted hearings, was in the best position to judge their truthfulness and credibility.

Both attorneys who testified are respected and experienced members of the bar. Mr. Bernstein had kept

meticulous records of the Ellamont Road transaction. There can be no question of Mr. Carney's good faith in having the building associations which he represents pass upon application for mortgage loans made by Manning-Shaw purportedly on behalf of Carter. However, the making of these applications by Manning-Shaw does not of itself prove the bona fideness of the contract. If there had been no sale in fact, the Eutaw Realty Corporation, which owned the property, had an interest in ascertaining the extent to which it could be financed. The alleged contract with Carter provided for a land installment contract, not a mortgage. It was not until late in August that Carter himself applied for a loan to an association, and at that time the parties to the purported contract may well have known that there was suspicion regarding the bona fideness of the alleged sale.

The first payment of $500.00, stated to have been made by Carter as a down payment on the June 19 agreement was in substance only a transfer of a deposit previously made by him on the Ellamont Road property, which the substantial weight of the evidence indicates had been forfeited. There were two additional payments shown by Manning-Shaw's records to have been made by Straughn on the Grantley Road account: one of $530.00 paid a few days after the signing of the contract, and one of $850.00 made after the complaint had been filed. The records as to these payments tended to support the Appellants' contentions, but the weight and interpretation of that evidence was for the Commission to consider in the light of all the other testimony and, of itself, in view of the other testimony, is not determinative of the issue here presented.

I find that the Commission's conclusions are supported by competent material and substantial evidence, and are not against the weight of the evidence disclosed by the entire record.

The Appellants further urge that the Commission's conclusions are in excess of the statutory authority of the Commission. They contend that even though Manning-Shaw engaged in a continued course of misrepresentation

and in misleading and untruthful advertising with respect to the "Sold" sign, which they deny, nevertheless, that conduct did not amount to a material fraud and therefore did not constitute bad faith and improper dealings. They refer to *Babb v. Bolyard*, 194 Md. 603, which involved an action for deceit by the buyer against the seller of a used automobile based upon alleged misrepresentation as to value and price. The Court held the defendant's request for a directed verdict and his motion for judgment n.o.v. should have been granted. In his opinion, Judge Markell said that the action for deceit in this State covers only actual fraud and not negligence or misrepresentation. He referred to Federal and State legislation, such as the Securities Act and Securities Exchange Act, which go beyond the common law scope of an action for deceit. The prohibitions of Section 224 of Article 56 with respect to the dealings of real estate brokers and salesmen are enactments for the protection of the public and are not confined to actions which at common law would give rights of action to private parties. See *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 382; *Lewis v. Moss*, 59 N.Y.S. 2d 193. In my opinion, the action of the Commission was not in excess of its statutory authority.

Listing Agreement Case

This case was heard separately on February 25, 1959. By its order, dated April 21 (the same date as the order in the preceding case), the Commission found that Manning-Shaw had "violated Section 224 (o) of Article 56 by knowingly permitting the use of a listing agreement without providing for a definite termination date without notice from either party." The Commission suspended Bernstein's broker's license and Shaw's associate broker's license for three months, the suspension to run concurrently with that ordered in the preceding case.

The complaint was filed on October 9, 1958. In its answer, and at the inception of the hearing before the Commission, the Appellants contended that the complainant had no standing in the proceedings. The complainant is a corpora-

tion and not being a taxpayer and having no property interest which might be affected, may well not have been a proper party to bring the case before the Commission. *Beckett v. Housing Authority*, 198 Md. 71; *Windsor Hills Impr. Assoc. v. M. & C. C. of Baltimore*, 195 Md. 383. However, sub-section (a) of Section 224 of Article 56 expressly provides that the Commission may proceed either upon its own motion or upon a verified complaint, and it is clear from the transcript and the order that the Commission adopted the first alternative.

The statutory prohibition against the use of a listing contract which does not provide for a definite termination date without notice from either party has been in effect since June, 1955. The record shows that for approximately a year thereafter, the Appellants used a listing agreement headed "Authority to Sell," which provided that:

> "The owner reserves the right to withdraw the property from said Agent at any time after *one* month by giving a ~~thirty (30) days~~ notice in writing. But it is understood that this agreement is revokable only in writing and is not revokable while any negotiations are pending for sale or exchange of the property. And if the property is sold or exchanged subsequently to any party with whom the said Agent has been negotiating, the commission will be paid to said Agent."

This particular form was discontinued in May or June of 1956. However, another "authority to sell" form was in use by the Appellants at least from May or June of 1956 until after the complaint had been filed in October, 1958. This second listing agreement contained the following paragraph:

> "The owner reserves the right to withdraw the property from said Agent at any time after six months. But it is understood that this agreement is not revokable while any negotiations are pending for sale or exchange of the property. And if the property is sold or exchanged subsequently to any party with whom

the said Agent has been negotiating, the commission will be Paid to said Agent."

As the Commission found, both of the above listing agreements violated the statutory provision. Both give the owner the right to withdraw the property from the agent, one after one month or thirty days and the other after six months, but neither contains the definite termination date without notice required by the statute. Each form provides that the agreement is not revocable while any negotiations are pending for sale or exchange of the property. Liability for commissions for services performed within the authorized period is a matter apart from the requirement of a definite termination date of the authority originally conferred. *Piper v. Wells*, 175 Md. 326 (1938).

Since the filing of the complaint, the Appellants have been using a listing agreement which expressly provides, in accordance with the statute, that "(t)his authority shall continue for a period of six months from the date hereof, except that either party, by giving thirty days' prior written notice, may cancel this contract at the expiration of three months from the date hereof or at any time thereafter."

The Appellants contend that any violation of sub-section 224 was not wilful or deliberate. At the hearing before the Commission, Bernstein testified that he was called down to see Mr. William G. Nicholson, former Executive Secretary of the Board, on a complaint that the use of a listing agreement containing the name of the Real Estate Board of Baltimore, was improper because Manning-Shaw was not a member of the Board. Bernstein testified that he showed Nicholson the first listing agreement above referred to, with the thirty-day clause, and that Nicholson told him the form of agreement was proper if the words "Real Estate Board of Baltimore" were omitted. Nicholson testified before the Commission that he advised the Appellants of the requirement of the law that a listing contract must have a definite termination date without notice. The Commission found his testimony persuasive.

At the taking of the additional testimony before the Court on May 11, Shaw, one of the Appellants, said with a letter sent by him on behalf of Manning-Shaw to the Commission on January 19, 1957, in response to a complaint by Wilbur Tyree dealing with a different matter. He had sent sample contracts which they were using to show they were not in violation of any real estate order. He testified that he recalled sending the Commission copies of all the contracts including the forms of listing agreements in use at that time. He referred particularly to the listing agreement with a thirty-day provision stricken out. The first form of listing agreement above referred to contains such a lining-out of the provision with respect to thirty days notice. The original letter sent by Shaw to the Commission under date of January 19, 1957, which is one of the exhibits in the Commission's hearings, states: "As early as January, 1956, we commenced using contracts which were not in violation of any Real Estate Code (Samples enclosed)." To the original letter are attached two documents entitled "Standard Contract of Sale," under the name of Manning-Shaw Realty Company. Neither of the forms of listing agreement above referred to nor any other form of listing agreement is attached to the exhibit. In his testimony before the Commission on February 25, 1959, Shaw testified that the contracts attached to the letter of January 19, 1957, were the contracts of sale.

The Commission, in its order, found that the Appellants had knowledge of the fact that their listing agreement did not comply with the provisions of the real estate law. This finding, in my opinion, in view of the entire record before the Commission and including the evidence taken in open Court, is supported by competent, material and substantial evidence and is not against the weight of such evidence.

The Appellants further contend that if there was a violation it was not a material one which justified the imposition of a three month suspension. They refer to the fact that the form of listing agreement used by the Appellants was substantially similar to the form upheld as legal in

Piper v. Wells, supra. That case was decided under the law as it then existed; the statute requiring a definite termination date was not enacted for some years thereafter. The statutory requirement was enacted by the Legislature as a regulation in the public interest. In my opinion, the continuing disregard of the requirement, which the Commission found to have taken place deliberately, was a material violation, and the penalty imposed by the Commission was not arbitrary or capricious.

The Cross Appeal

The complainants in the first case involving 3800 Grantley Road filed a cross appeal from so much of the Commission's order in that proceeding as deals with the allegations of the complaint that the Appellant Bernstein made a false representation under oath in his application for salesman and broker's licenses. They allege that the record shows the respondent was clearly guilty of the offense charged, that they were entitled to a finding by the Commission on this issue, even if the Commission was of the opinion that action thereon was not warranted at the time of its order, and that the Commission's refusal to suspend or revoke the license was a grossly inadequate action. There is a similar allegation as to the inadequacy of the penalty in the Grantley Road case.

Sub-section (a) of Section 224 of Article 56 gives the Commission the power to suspend or revoke a license at any time where the license has been obtained by false or fraudulent representation. Sub-section (m) provides, as a ground for revocation or suspension, convictions for forgery, embezzlement, obtaining money under false pretenses, etc., in a court of competent jurisdiction of this or any other state. Section 229 gives the Commission the power to promulgate reasonable rules and regulations. One of the questions in the form of application for a license required by the Board to be filled out by an applicant is whether or not the applicant has been convicted at any time during the past five years of forgery, embezzlement,

obtaining money under false pretenses, extortion, criminal conspiracy to defraud or any other felony. There is no limitation in this question to convictions under the laws of Maryland or any other state.

In a prior proceeding before the Board filed against Bernstein by other complainants in 1957, it was charged that Bernstein had made a false application because he had answered the question referred to in the negative, whereas he had pleaded guilty in the Federal Court to indictments charging him with defrauding the United States in 1949. Testimony was taken, but the Commission took no disciplinary action. The record discloses that substantially the same facts were produced before the Commission in the 1958 hearing as in the prior proceedings in 1957. Bernstein's first alleged misrepresentation was made in an application for a salesman's license. A broker's license was issued to him thereafter, in May, 1958, when the Commission had knowledge of the prior charge and the proceedings in connection therewith.

Section 254 of the Administrative Procedure Act (Code, Article 41) provides that "(e)very decision and order adverse to a party to the proceedings rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . . ." No authority has been cited, and I have found none, that, in circumstances such as here present, the complainants are entitled to a reversal of the Commission's decision or to a remand because findings of fact were not made. In effect, the Commission's conclusion on this matter was analogous to the sustaining of a demurrer in a legal action. The Commission decided that in view of all the circumstances, under the discretion given to it by the Act, no disciplinary action at this time was warranted. Neither the conclusion of the Commission nor the absence of findings of fact, in my opinion, was arbitrary or capricious or in excess of the Commission's statutory authority or affected by other error of law.

Clearly, the extent of the disciplinary action in the Grantley Road matter was a matter within the Commission's discretion.

An order will be entered affirming the decisions of the Commission in both cases.

REUBEN OPPENHEIMER,

Judge.

June 4, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 572

SAMUEL M. FELDSTEIN and WARREN S. SELF
t/a MANNING SIGN EQUITY COMPANY

Appellants

vs.

REAL ESTATE COMMISSION OF MARYLAND
ALLEN SOLOMAN and [illegible]

Appellees

SAMUEL M. FELDSTEIN and WARREN S. SELF
t/a MANNING SIGN EQUITY COMPANY

Appellants

vs.

REAL ESTATE COMMISSION OF MARYLAND
ALLEN SOLOMAN and [illegible]

Appellees

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 852

MANUEL M. BERNSTEIN AND WARREN S. SHAW, T A MANNING SHAW REALTY COMPANY,

Appellants,

v.

REAL ESTATE COMMISSION OF MARYLAND AND ALLEN KLEIMAN AND JEANETTE KLEIMAN, HIS WIFE, AND BERNARD CHERRY AND DORA CHERRY, HIS WIFE,

Appellees.

MANUEL M. BERNSTEIN AND WARREN S. SHAW, T A MANNING SHAW REALTY COMPANY,

Appellants,

VS.

REAL ESTATE COMMISSION OF MARYLAND AND ALLENDALE-LYNDHURST IMPROVEMENT ASSOCIATION, INC.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm on the following grounds:

(a) The Federal question sought to be reviewed was not properly raised before or expressly passed upon by the Court of Appeals of Maryland;

(b) This appeal is not within the jurisdiction of this Court because it has not been taken in conformity to statute;

(c) This appeal does not present the question sought to be reviewed, or any substantial Federal question.

STATEMENT

This is an appeal from a decision of the Court of Appeals of Maryland affirming two Orders of the Baltimore City Court, (Reuben Oppenheimer, Judge). The opinion is reported in Md. , 156 A. 2d 653. The case arose out of two complaints filed with the Real Estate Commission of Maryland (hereinafter referred to as the "Commission"), and the two cases are now consolidated in one record. The first complaint was filed with the Commission pursuant to the provisions of Article 56, Section 224(a), Annotated Code of Maryland (1957 Ed.), on September 5, 1958, by two owners of property in the 3800 block Grantley Road, Baltimore, Maryland. It claimed in essence that the placing of a "SOLD" sign on the property, known as 3800 Grantley Road, by the Appellants, licensed real estate brokers, in the latter part of June, 1958, and the maintaining of said sign through the summer of 1958, when the property was never actually sold, constituted a violation of certain provisions of Article 56, Section 224, *supra*. A detailed answer was filed by the Appellants on September 29, 1958 denying the essential allegations of the complaint and affirmatively stating that a contract of sale for the property known as 3800 Grantley Road had been entered into by the owner of the property with one, Joseph Carter and wife, and further asserting that settlement for the property had not

yet taken place. The Commission held extensive hearings on the issues presented and, by its Order dated April 21, 1959, found that the Appellants had engaged in a continued and flagrant course of misrepresentation in violation of Article 56, Section 224(b), *supra*, that the Appellants also engaged in misleading and untruthful advertising prohibited by Section 224(j), *supra*, and that the Appellants' conduct constituted and demonstrated bad faith and improper dealings in violation of Section 224(s) *supra*.

The second proceeding arose out of a complaint filed with the Commission on October 9, 1958, by the Allendale-Lyndhurst Improvement Association, Inc. claiming the use of an illegal form of listing agreement by the Appellants. An answer was filed by the Appellants and the Commission on its own motion decided to investigate and determine the issues presented. After hearing testimony on February 25, 1959, the Commission by its order dated April 21, 1959, found that Appellants had violated Section 224(o) Article 56 by knowingly permitting the use of a listing agreement without providing for "a definite termination date without notice from either party".

In each case the Commission suspended the broker's or associate broker's license of the Appellants for a period of three months, the suspensions to run concurrently.

Petitions to review the actions of the Commission were brought by the Appellants under the Maryland Administrative Procedure Act (Article 41, Sections 244-246, Annotated Code of Maryland, 1957 Ed.). Judge Oppenheimer, after a complete review of the proceedings, by his written opinion dated June 4, 1959, found that the orders of the Commission were supported by competent and substantial evidence and, therefore, sustained them. From these findings and subsequent formal orders an appeal was taken to

the Court of Appeals of Maryland. During the pendency of the court review of the Commission's orders, the suspension of Appellants' licenses has been stayed.

On the appeal to the Court of Appeals of Maryland, the question presented was whether there was sufficient evidence to sustain the orders of the Real Estate Commission of Maryland. The Court of Appeals, by its Opinion dated December 18, 1959, found that there was competent, material and substantial evidence to support the Commission's findings of fact and conclusions of law, and therefore it affirmed the Orders of the Commission and the Order of the Baltimore City Court.

ARGUMENT

I.

The Federal Question Sought To Be Reviewed Was Not Properly Raised And Preserved Below.

The Appellants did not raise in their brief, reply brief, or in oral argument in the Court of Appeals of Maryland the issues now sought to be raised by their Jurisdictional Statement. The Opinion of the Court of Appeals expressly states that the questions now presented to this Court were not before that court and therefore not considered by it. (Jurisdictional Statement, Appendix B, pp. 15, 17, 18).

After the decision, the Appellants filed a motion for reargument in the Court of Appeals, referring to the language of the Court's Opinion and stating "that in view of the aforegoing, it is clear that this Court (Court of Appeals of Maryland) did not think it necessary to decide the question of Federal Constitutional Law raised by your petitioners in the hearing before the Real Estate Commission of Maryland, and on appeal to the Baltimore City Court" (Appellants' Motion for Reargument in the Court of Ap-

peals of Maryland, par. 4); and "that for reasons not known to your petitioners or to their present counsel, former counsel namely, J. Calvin Carney, Esq., who in fact appears as counsel on the Jurisdictional Statement in this Court did not include in their brief your petitioners' contention in the Court below and before the Commission that the proceeding was a conspiracy to deprive your petitioners and their Negro customers of their constitutional rights" (Appellants' Motion for Reargument in the Court of Appeals of Maryland, par. 10). The motion prayed "leave to file a brief upon the Constitutional Question so this Court may decide it directly and squarely". On January 20, 1960, the Court of Appeals passed an Order ruling without comment "that the motion for reargument is denied."

On the foregoing facts, it is beyond doubt that the question sought to be reviewed is not now before this Court. The Maryland Court of Appeals, like most other appellate courts, has consistently and uniformly held that any contentions on behalf of an appellant not briefed in that Court may be deemed abandoned and need not be considered by the Court of Appeals.[1]

As was said in *John v. Paullin*, 231 U.S. 583, 585:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appeal courts, and the mode and time of invoking that jurisdiction, and the

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[1] *Vestry of Emmanuel Church of Balto. v. Safe Dep. & Tr. Co.*, 169 Md. 28, 37, 179 A. 64; *Taxes v. Aerial Products, Inc.*, 210 Md. 627, 644, 124 A. 2d 805; *Schneider v. Davis*, 194 Md. 316, 71 A. 2d 32; *Holler v. Lowery*, 175 Md. 149, 200 A. 353; *Wolfe v. State, use of Brown*, 173 Md. 103, 194 A. 832; *State v. United Rwys. & Elec. Co.*, 162 Md. 404, 159 A. 916; *Globe Slicing Mach. Co. v. Murphy*, 161 Md. 667, 158 A. 26; *May Co. v. Drury*, 160 Md. 143, 153 A. 61. See also Md. Rules of Procedure, Rule 831, formerly 39 of the Rules and Regulations respecting Appeals of the Court of Appeals of Maryland; *Schroeffer v. A. S. Abell Co.*, 4th C.C.A. 138 F. 2d 111, cert. den. 321 U.S. 763, rehearing den. 322 U.S. 770; 2 Maryland Law Encyclopedia, Appeal and Error, §402 pp. 312-13.

rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

It is well and specifically established the Court of Appeals' denial without comment of appellants' motion for reargument, which attempted to raise a federal question not theretofore before the Court of Appeals, does not constitute a basis for review in this Court, it being presumed that the ruling on the motion was based on State procedural grounds, precluding Supreme Court review.[2]

The instant case affords even less basis for jurisdiction than the cases herein cited, since the opinion of the Court of Appeals expressly makes clear that the question now sought to be raised was not properly before it and the Appellants' motion "for reargument" in the Court of Appeals was in fact an express request to raise a constitutional question on appeal for the first time at that stage of the proceeding, which was denied.

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[2] *Cons. Turnpike Co. v. O. V. R. Co.*, 228 U.S. 326, 333-4; *Forbes v. State Council*, 216 U.S. 396, 399; *McCorquodale v. Texas*, 211 U.S. 432, 436-7. Cf. *Ill. Cent. R. Co. v. Ky.*, 218 U.S. 551; *Pa. R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 462-3; *Erie Co. v. Purdy*, 185 U.S. 148; *Mut. Life Ins. Co. v. McGrew*, 188 U.S. 291, 309. See, also, *Bailey v. Anderson*, 326 U.S. 203, 206-7 (Supreme Court assumes where procedural deficiency exists in raising and preserving federal questions in State courts that State court silence on the federal question, unless it can be shown otherwise, is due to procedural deficiency, thus precluding Supreme Court review); *Stembridge v. Ga.*, 343 U.S. 541, 547-8 (where federal question raised for first time in petition for rehearing in intermediate appellate court; highest State court's refusal without opinion to hear case precludes Supreme Court review since Supreme Court is without jurisdiction "when the question of the existence of an adequate State ground is debatable" and action of highest State court might have been based on adequate State procedural ground).

It is clear beyond the slightest question that there is nothing for this Court to review.

II.

This Case Is Not Within The Appeal Jurisdiction Of This Court.

While the word "statute" in 28 U.S.C., Sec. 1257(2) is liberally construed, it includes only State action legislative in character, i.e., "rules having continuing force and intended to be observed and applied in the future". *King Mfg. Co. v. Augusta*, 277 U.S. 100, 104. The disciplinary action taken by the Real Estate Commission of Maryland is quasi-judicial in character and not reviewable on appeal. The cases cited at pages 2-3 of Appellants' Jurisdictional Statement to support the jurisdiction of this Court are inapplicable since they were: (a) decided prior to the 1925 amendment of the jurisdictional statutes of this Court which eliminated from the law the right to appeal "Where is drawn in question the validity of * * * an authority exercised under any State,[3] or (b) clearly legislative orders;[4] or (c) direct authority against appellants on the question of appeal jurisdiction in this case.[5]

Moreover, before the Real Estate Commission (Record E. 28, 687) and the Baltimore City Court (Record E. 513, 752), the Appellants' contention was not that any statute

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[3] *Myles Salt Co. v. Bd. of Comm'rs.*, 239 U.S. 478; *Gross v. U. S. Mtge. Co.*, 108 U.S. 477; *Parmelee v. Lawrence*, 11 Wall. 36; *Murdock v. City of Memphis*, 87 U.S. 590; *Peavey v. City of Des Moines*, 173 U.S. 193; *West Chic. Street Ry. Co. v. Chicago*, 201 U.S. 506.

[4] *Sultan Ry. Co. v. Dept. of Labor*, 277 U.S. 135 (order prescribing reporting system as part of State Workmen's Compensation Fund); *McCollum v. Bd. of Education*, 333 U.S. 203 (released time religious instruction program prescribed and established by Board of Education).

[5] *Ireland v. Woods*, 246 U.S. 323, which dismissed proceedings on writ of error, and *Norris v. Ala.*, 294 U.S. 587, which came up on certiorari.

of Maryland was void, but that the "complaint" was "an effort to deprive the respondents of their lawful rights as guaranteed by the Constitution of the United States" (Record E. 28). Appellants did not claim at any stage of the proceedings that application of the Maryland Real Estate License law to their particular circumstances would make the statute void under Federal law, but their federal claim, before it was abandoned in the Court of Appeals of Maryland, was that their federal rights prevented application of the statute to them. It is well settled under these circumstances that an adverse decision amounts to a denial of assertion of federal rights rather than a validation of the State statute, and consequently no appeal will lie.[6]

III.

This Appeal Does Not Present The Question Sought To Be Reviewed Or Any Substantial Federal Question And It Is Manifest That The Questions On Which The Decision Of This Case Depends Are So Unsubstantial As Not To Need Further Argument.

A. Introductory Statement

The Appellants' statement of the question sought to be reviewed does not deny that Appellants were proved guilty of the charges brought against them, nor can it in fact be fairly contended that the evidence does not fully support the findings of the Real Estate Commission in each case.

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[6] *Mergenthaler Linotype Co. v. Davis*, 251 U.S. 256, 259; *Charleston Fed. Savings & Loan Assoc. v. Alderson*, 324 U.S. 182, 185; *Jett Bros. Distilling Co. v. Carrollton*, 252 U.S. 1; Cf. *Ex Parte Bransford*, 310 U.S. 354, 361 (distinguishing between petition for Federal injunction against enforcement of State statute on the ground of unconstitutionality, requiring a three-judge court, and petition seeking injunction on ground of unconstitutionality of result obtained by use of State statute not attacked as unconstitutional, where three-judge court unnecessary).

1. *The 3800 Grantley Road Case*

This complaint filed by neighbors of the property in question charges that Appellants, real estate brokers and investors, posted and maintained from June 1958 continuously up to the filing of the complaint on September 5, 1958, a sign on 3800 Grantley Road, Baltimore City, which Appellants owned through a corporation, describing the property as "sold" by them, when actually it was not sold.

Approximately two weeks after the complaint was filed, one Joseph J. Carter, his wife and eight of his children, appeared from time to time on the property. The Appellants filed a sworn answer on September 29, 1958, claiming that the property had been sold to Carter on June 19, 1958, under a contract providing for a purchase price of $18,000, subject to $120 annual Maryland ground rent, a down payment of $3,000, and settlement within thirty days by land installment contract. The answer stated that "settlement has not yet taken place * * * and it is expected that settlement therefor will take place very shortly".

At the hearing before the Real Estate Commission several months later, Appellants produced a purported land installment contract with Carter, dated and allegedly executed September 19, 1959, or ten days prior to the filing of Appellants' answer. This contract, likewise for $18,000, subject to $120 annual ground rent, provided for weekly payments of $40 by the purchaser, exclusive of repairs and maintenance, and was claimed to have been the settlement called for by the earlier document.

The Appellants claimed that these two alleged contracts established the sale of the property and the truthfulness of their advertisement. The Real Estate Commission of Maryland found to the contrary on evidence which included the following:

(a) Carter was presented to the Commission by Appellants, who had known him for approximately a year prior to June 1958, as a responsible purchaser, with four children and a substantial income. Actually, Carter, 58 years of age, had been long employed full-time as a porter in an automobile agency, earning only $54 a week, with which to support eight children, including a four month old baby and several very young infants.

(b) Sergeant Violet Hill Whyte, a policewoman whose testimony the Real Estate Commission found "unimpeachable", testified that Carter's occupancy of the premises was not the normal occupancy of a dwelling — on several occasions she observed the entire family of ten occupying only the kitchenette in the dead of winter, with no oil, no heat, absolutely no food in the refrigerator, and no adequate clothing for the children. Neighbors found the Carters seldom on the premises and during their absence the wash stayed on the line for protracted periods without being taken down.

(c) Appellants knew it was impossible for Carter to purchase the Grantley Road property, having satisfied themselves by a credit check in July 1958, in connection with another property, that he was a "deadbeat".

(d) The Appellants, as brokers for another property, 3500 Ellamont Road, had prior to June 1958, tendered the owners a contract with Carter which bound Carter to a settlement date later than the July 19, 1958 settlement date provided in the alleged Grantley Road contracts; and Appellants, in Carter's name, were actively negotiating with the owners of the Ellamont Road property as late as July 24, 1958, when they requested an extension of settlement for Carter on Ellamont Road until August 20, 1958.

(e) The salesman for both the Ellamont Road and the Grantley Road properties, whose only compensation is by commissions which Appellants pay even if the buyer ultimately defaults, received no commissions whatever on the alleged Grantley Road sale, but was actually $250 out of pocket on both transactions, having been required by Appellants to put up $250 to make good a forfeiture of deposit on the Ellamont Road contract, without even a set-off for commissions on the alleged Grantley Road sale.

(f) Appellants, upset by the evidence as to the absence of commissions, made an elaborate explanation to the effect that checks were issued to the salesman sporadically and in round amounts as he needed money, with periodic balances struck from time to time. After one of the Appellants emphatically rejected a proffered opportunity to retract this explanation, there were introduced in evidence photostatic copies of the nine checks from the Appellants to the salesman for September, 1958, when the Grantley Road settlement allegedly took place. All but one of these checks were labeled "Commission" on a particular sale of property, whose address was stated. Each check was in the precise amount of the commissions payable and was dated promptly after the sale in question. There was, of course, no check for the Grantley Road property.

(g) While the "sold" sign was up, Carter, the alleged purchaser, mowed the lawn and did other odd jobs from time to time in evenings and weekends around the property. In conversation with neighbors, he referred to Appellants as his "boss" and did not know who had bought the house.

(h) In October, 1958, shortly after the alleged settlement for 3800 Grantley Road, Carter reported to his employer, the Brooks-Price Buick Co. in Baltimore, a change of address from 2531 Madison Avenue, Baltimore, his previous

residence, to 2028 North Payson Street, a small row house in another neighborhood in Baltimore.

(i) Late in August, 1958 [illegible] man posing as a prospective purchaser, was told by [illegible]nts' salesman and one of the Appellants themselve[illegible]ne Grantley Road property was not sold, and that [illegible] have a good reason for putting that (sign) there". The Appellants showed him the property and offered to let him move in immediately and about a week afterwards Appellants, through one of their salesmen, actively sought him out at his place of business in order to consummate the sale of the property by Appellants to him.

2. *The Listing Contract Case*

This complaint charged Appellants with use of an illegal form of listing agreement. Article 56, Section 224(o), Annotated Code of Maryland (1957 Ed.), includes among grounds for revocation or suspension of a real estate broker's license, "accepting a listing contract to sell property unless such contract provides for a definite termination date without notice from either party". The Appellants' standard listing contract provided that "the owner reserves the right to withdraw the property from said agent at any time after six months. But it is understood that this agreement is not revokable (sic) while any negotiations are pending for sale or exchange of the property". The complaint charged that this form of agreement violated the law in that there is no definite termination date without notice, but only a right to the owner to withdraw at any time after a named period, and further in that the right of withdrawal is conditioned on the absence of any "negotiations pending" for the sale of the property at the time of withdrawal.

Contrary to Appellants' statement at page 6 of the Jurisdictional Statement that their past practice demonstrated

that their listing agreement had always been used in a manner consistent with the requirement of Section 224 (o) of Article 56, *supra*, the Appellants' answer admitted that they "have always permitted property owners who wished to wishdraw property from their office to do so on written notice and the filing of an affidavit that they did not have any prospect in view to whom they expect to sell the property within a period of 30 days" (Record E. 685) — precisely the kind of restriction the statute is aimed at.

The Appellants' defense before the Commission was that they did not wilfully or deliberately violate the law. Appellant Shaw, however, admitted that he read the provisions of Article 56, Section 224 (o) in 1956 (E. 698-99). The former executive secretary of the Real Estate Commission testified that he had called the Appellant Bernstein and another real estate broker into this office in 1956, about a listing contract they used jointly (E. 712-13), which falsely implied that Appellants were members of the Real Estate Board of Baltimore. He said on this occasion he explained to Bernstein the law, passed in 1955, concerning a definite termination date without notice from either party and Bernstein said he would comply with it (E. 717). Bernstein, after considerable hedging (E. 725-727), admitted the conversation, and admitted that he knew about the change in the law while he was using the listing contract which was the subject of the instant complaint.

The Commission found that "the testimony of Mr. William G. Nicholson, the former Executive Secretary of this Commission, is persuasive in that he testified that he advised the Respondents of the requirement in the law that a listing contract must have a definite termination date without notice. The Commission, therefore, finds that

the Respondents had knowledge of the fact that their listing agreement did not comply with the provisions of the real estate law" (E. 741-42).

B. The Question Sought To Be Reviewed Is Not Involved In This Case

The two elements in Appellants' claim of federal rights are that the complaint was initiated by "private citizens whose primary motive is to prevent the sale of homes to Negroes in formerly all white neighborhoods", and that the "alleged evil" aimed at by the application of the statute is "insubstantial and technical as distinguished from one which is real and substantial". (Jurisdictional Statement, p. 3.) The Appellants now seek to base their case to this Court on the question of race bias and prejudice.

The record presents no such question. Early in the proceedings before the Real Estate Commission (E. 59), one of the members of the Commission clearly and concisely stated for the record the scope and purposes of the hearing as follows:

> "This is a hearing, as I understand it, for the purpose of determining whether or not this broker has violated the law in connection with the exercising of the rights of his license. We're not concerned with block-busting as so far defined. If there is anything fraudulent in the way a listing is procured or a sale has been executed, that's what we want to hear. We're not going to rule, we're not going to be concerned with whether a house was sold to white or colored; that's beside the point. The question is whether it's properly represented or properly sold or the mechanics of the transaction were properly handled, regardless of whether it was between two white people, two colored people or between a white and a colored person. So, now, let's not get off on racial issues or even try to bring them into the case because we're not going to rule on them."

In the 3800 Grantley Road case, the complainants were questioned as to their motives on cross examination by the Appellants' own counsel, who elicited all the evidence on this subject in their testimony. The testimony of Mrs. Kleiman is instructive:

> "I wasn't interested in whether the property was sold or not, in terms of to whom it had been sold. I was interested in whether or not the property had been falsely marked as sold. I have no objection to there being a negro family across the street from me."
> * * *
>
> "I thought that the intent of having a sign marked Manning-Shaw and sold was to give the impression that this house had been sold to a negro family, since this seemed at least to be the general impression people would get from such a sign, and I was concerned that there were many properties which were marked sold which were not sold, the impression would then spread throughout the neighborhood that this was not an integrated neighborhood, such as I was interested in living in, but that most of the neighborhood has been sold to negro families and I thought if I could in some way, bring up before the Board the fact that some of these signs were not really the result of a sale, but simply an attempt to indicate that there had been a sale, that this sort of thing could be stopped and then my aim, which is to keep Ashburton an integrated neighborhood, would then be fulfilled. It can't be if there are fifteen or so houses around in the area all marked sold when they are not really.* * *
>
> "I thought this example right across the street from me would be a place for me to intervene * * * this one was right here and we sat on our patio and could see the sign and the people coming and, apparently, no one moving in or doing anything then to the house that would indicated that they were planning to move in.* * *
>
> "Q. Now, aren't there colored people all around you in Ashburton? A. Yes.

"Q. And what do you think one or two more is going to do to you? A. I have no objection to one or two or five or ten more.

"Q. How many do you have objection to? A. I don't have any objection to the area making its normal moves in any direction. What I am objecting to are what I feel are attempts to arouse feelings of panic, that the whole neighborhood is going to turn, and I think false sold signs are part of an attempt of this nature.

"Q. Well, how many do you think should be allowed in your neighborhood, by you? A. How many negro families?

"Q. Yes. A. As many as move in under the natural and normal turn-over in an area.

"Q. What do you consider that to be? A. I don't know. When a house is sold, it will be sold to a negro family or to a white family, but when someone gets the impression that they do not want to live in an entirely negro neighborhood and look around and decide on the basis of sold signs, well, gee, all of these houses have been sold. I'm afraid that many more of the people than would under normal circumstances, obviously people move because a house is too small or because it's too large or because they want to live in another neighborhood, but I object to pushing people into moving out of an area because you're trying to convince them that it's about to turn entirely negro" (E. 68, 69, 70).

There was no attempt to elicit any evidence as to the motives of the Allendale-Lyndhurst Association in bringing their complaint.

The Appellants were not disciplined for anything technical or insubstantial. The State of Maryland has a substantial interest in enforcement of honesty and truthfulness of all of its real estate brokers and transactions.

Moreover, in the Grantley Road case, the Commission had before it not only the falsity of Appellants' advertisement over a substantial period of time, but also a flagrant and deliberate attempt by Appellants to conceal their conduct by false testimony before the Commission.

The Allendale-Lyndhurst case involves no racial features, and is a clear case of wilful, continued and substantial violation of the uniform and general policy of the State of Maryland regarding listing forms as announced by its Legislature in 1955.

C. There Is No Substantial Federal Question In This Case.

Even if this appeal presented the question sought to be reviewed, the question is not substantial. The question as presented by the Appellants does not contend that the Real Estate Commission or courts of Maryland were biased, or themselves guilty of any ulterior purpose of denial of due process or equal protection. The Appellants' counsel, at the conclusion of his argument before the Commission, in fact, expressed appreciation of the way in which the Commission had "listened to all the testimony in this case and the fair and impartial way you have permitted us to put in everything we thought was important" (E. 783).

N.A.A.C.P. v. Alabama, 357 U.S. 449, is totally inapplicable. In that case the State itself was using a statute beyond its fair intendment as a pretext to achieve an unconstitutional purpose, whereas in the instant case the Appellants' sole challenge is based on the alleged motives of the private complainants.

Even if complainants' motives were not misstated by Appellants, they are irrelevant here where the agencies of the State have proceeded fairly in vindication of a

general statutory interest of the State itself in the honesty and fairness of all real estate brokers and transactions. Appellants concede that "It is of course correct that where a State statute is aimed at a substantial evil which the State has an interest in preventing, it is unimportant that the party who seeks the protection of the statute has ulterior motives" (Jurisdictional Statement, p. 10).

The Appellants are obviously claiming special exemption from Maryland's general statutory requirements of honesty and truthfulness on the part of real estate brokers, and their claim rests on the sole ground that they specialize in sales to Negroes. It is perfectly clear that Appellants' undoubted right to sell any property they wish to any person they wish does not give them a special license to violate the law regarding truthful conduct and advertising. Appellants are entitled to and were accorded equal protection of the laws without regard to race. They are not entitled to special exemption from the law on account of the race of their customers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the Court of Appeals of Maryland be affirmed, the mandate to issue forthwith.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 852

MANUEL M. BERNSTEIN AND WARREN S. SHAW, T/A MANNING SHAW REALTY COMPANY,
Appellants,

vs.

REAL ESTATE COMMISSION OF MARYLAND AND ALLEN KLEIMAN AND JEANETTE KLEIMAN, HIS WIFE, AND BERNARD CHERRY AND DORA CHERRY, HIS WIFE,
Appellees.

MANUEL M. BERNSTEIN AND WARREN S. SHAW, T/A MANNING SHAW REALTY COMPANY,
Appellants,

vs.

REAL ESTATE COMMISSION OF MARYLAND AND ALLENDALE LYNDHURST IMPROVEMENT ASSOCIATION, INC.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

APPELLANTS' ANSWER TO APPELLEES' MOTION TO DISMISS THE APPEAL

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APPELLANTS' ANSWER TO APPELLEES' MOTION TO DISMISS THE APPEAL

The Maryland Court of Appeals Declared the Federal Question Here Raised Adversely to the Appellants' Contention in this Court.

The principal basis of the Appellees' Motion to dismiss the Appeal is that the Federal question here raised was not

briefed or argued to the Court of Appeals nor decided by it. It is of course true that the Appellants did not include in their brief to the Court of Appeals the Federal question which they seek to have reviewed in this court; it is also true that the record does not show that the Appellants argued the Federal question to the Court of Appeals. From this the Appellees argued that the Federal question was waived and cannot now be raised on appeal to the Supreme Court of the United States.

The law, however, is clearly contrary to the Appellee's claim. In the case of *Gross v. U. S. Mortgage Co.*, 2 S. Ct. 940 (1883), this Court had before it the question of whether, in determining the question of its jurisdiction in a case, it might refer to the opinion of the State Court. In that case the record did not disclose upon its face that the Federal question sought to be raised on Appeal had been decided by the highest court of the State adversely to the Appellant's claim. However, the opinion of the State Court clearly disclosed that the Federal question had in fact been decided by that Court. This Court said:

> "In the existing State of the law, it is our duty to examine the opinion of the State Court of Illinois in connection with other portions of the record for the purpose of ascertaining whether this Writ of Error (now appealed) properly raises any question determined by the State Court adversely to the right, title, or immunity under the Constitution or laws of the United States and specifically set up and claimed by the party who brings the writ."

The *Gross* case therefore establishes the principle that the Supreme Court of the United States has the right and the duty to refer to the opinion of the highest court of the State for the purpose of determining whether the Federal question brought on Appeal has been decided by that State

court. The *Gross* case has not been overruled and the principle is still sound law.

The *Gross* case relied upon *Murdock v. City of Memphis*, 20 Wall 633, which appears to be the first decision of the Supreme Court of the United States in which the principle established in the *Gross* case was recognized. In the *Murdock* case, the Court abandoned the former practice of restricting its scrutiny to the face of the record. It was there said that in determining whether a Federal question was raised and decided in the State Court, this Court has been inclined to restrict its inquiry too much by the express limitation "to the face of the record". The restriction to which the Court referred in *Murdock* was one which evolved from the Judiciary Act of 1789, Section 25, which provided that the State court, when reviewing a final judgment or decree of the highest court of a State, must restrict itself to a consideration of such errors as appeared "on the face of the record." *Murdock* was decided after the passage of the Act of 1867 and that act omitted the restriction contained in Section 25 of the Act of 1789.

It is therefore today well-settled that the Supreme Court may consider the opinion of the State court whose judgment is being reviewed for the purpose of determining whether the Federal question before this Court has been decided adversely to the contention of the Appellants.

In the present case, the Opinion of the Court of Appeals of Maryland contains an extensive discussion of the Constitutional point raised by the Appellants before the Real Estate Commission of Maryland and in the Baltimore City Court on appeal from the Commission. The Opinion of the Baltimore City Court was essentially that even though the Complainants sought to accomplish the unconstitutional

purpose of preventing the sale of property to Negroes in formerly all-white neighborhoods, i.e., so-called "block-busting", the fact that the Real Estate Commission of Maryland did not share the unlawful motives of the Complainants remove the constitutional question from the case. The Judge in the lower court stated as is indicated at pages 9 and 27 of the Appellant's Jurisdictional Statement that the Commission asserted early in the hearing and reiterated throughout the proceeding that it was not interested in "block-busting" and would not consider evidence bearing upon the issue. Therefore, the lower court decided, no constitutional rights of these Appellants had been abridged.

With this opinion of a lower court, the Court of Appeals of Maryland stated that it was in complete accord. The Court stated:

> "Whatever may have been the real motive of the Complainants, the Commission early in the proceedings before it, made it clear and continued to reiterate, that the hearing was for the sole purpose of determining whether Bernstein and Shaw had violated the law in connection with the exercise of their rights under the licenses issued to them and that the Commission was not concerned with block busting. Furthermore, we think the lower court was correct in refusing to receive into evidence even an explanatory background, the proffered exhibits with regard to publicity given the accusation. At the conclusion of the hearing on appeal below, the lower court found no basis in the record to believe it was either biased or arbitrary in the manner in which it conducted the proceedings before it. The question is not specifically before us on the appeal and we shall not consider it further."

It is clear from the opinion of the Court of Appeals, that the constitutional question raised in this case was

decided by that Court. The lower court, in its opinion as we've indicated above, stated that the motives of the complainants in bringing the Complaints before the Commission were in essence immaterial. It said, as did the Court of Appeals, that whatever the motives of the Complainants might have been, the Commission's assertion during the hearing that it was not concerned with Block Busting removed the constitutional question from the case. The lower court also refused to receive into evidence the proffered exhibits which these appellants sought to introduce for the purpose of showing the unlawful motives of the complainants. The Court of Appeals in its opinion approved the lower court's determination of both of these issues, and both of these issues were related inextricably to the constitutional question which these appellants here assert.

If the Court of Appeals, in its opinion, had concluded the statement above quoted, with the phrase "we agree with the lower Court's determination of the constitutional questions raised by the appellants before it" instead of with the phrase "The question is not specifically before us", it would be clear that this Court had jurisdiction. It can therefore hardly be contended that a mere change in phraseology at the conclusion of a portion of a court's opinion in which it decides a constitutional question can have the effect of depriving the Supreme Court of the United States of jurisdiction that it otherwise has. As this Court has held in numerous decisions, the question is not whether the Federal question was argued and briefed in the Court below, but whether the court below decided the Federal question adversely to the party seeking review in this court.

It is clear from the opinion of the lower court, and the opinion of the Court of Appeals referring to that lower court's decision of the constitutional question, that the

Court of Appeals decided the question here raised adversely to the asserted rights of the appellants in this case.

Moreover, it is perfectly clear under the Maryland decisions that the language of the Court of Appeals with reference to the constitutional question is of such a character that under the court's own decisions, the Maryland Court of Appeals would be obligated to follow it in future cases. See: *Alexander v. Worthington*, 5 Md. 471; *Michael v. Morey*, 26 Md. 239, 90 Am. Dec. 106; *McGraw v. Merryman*, 138 Md. 247, 104 A. 540.

Therefore, for practical purposes and in terms of substance as distinguished from legal form, it is clear that the constitutional question which these appellees asserted before the Commission and reasserted before the Baltimore City Court was decided by the Court of Appeals of Maryland; and it was decided by that court adversely to the constitutional rights which these appellants now assert.

The Appellees' reference to the Appellants' motion for reargument in the Court of Appeals is immaterial. Obviously it makes no difference whether a motion for reargument was filed or not; for if the Court of Appeals did in fact decide the Constitutional question, and it is clear that it did as indicated above, the fact that the appellants sought to argue the constitutional question by a motion for reargument has no effect upon this court's jurisdiction. It is of course true as the appellees assert that where a constitutional question is raised for the first time on motion for reargument and the State Tribunal refuses to hear argument, the constitutional question has not been properly reserved for purposes of this Court's jurisdiction. Such is not the case here however. As has been stated the Federal rights of these appellants were asserted before the Commission and the Baltimore City Court and denied

in both instances and the Court of Appeals of Maryland in its opinion approved the denial of the asserted Federal rights in the tribunal below.

The State Statute As Applied Was Drawn in Question Within the Meaning of the Judiciary Act Conferring Jurisdiction upon this Court.

The Appellees' claim that the Appellants have no right of appeal under the Federal Statute conferring jurisdiction upon this Court because no state statute was drawn in question on the ground that it denies a right conferred upon the party seeking review by the United States Constitution or by a federal statute. This contention in similar cases, has been made and rejected by this Court on numerous occasions. One of the earliest cases in which the Appellees' contention was laid to rest is *Myles Salt Company v. Board of Commissioners of The Iberia and St. Mary District*, 239 U.S. 478, 36 S. Ct. 204, 60 L. Ed. 392. In that case the court held that even though a direct attack upon a State's Statute as drawn was not made, if the action taken by an Administrative Agency of a State was taken pursuant to statutory authority and the highest court of the state sustains such action against asserted constitutional rights, the action taken is in effect a part of the statute for purposes of judicial review by this court on Writ of Error (now appealed). And if the action taken pursuant to the statute does deny asserted federal or constitutional rights, this court will not permit a decree arising out of such action to stand. The language of the Supreme Court in the *Myles* case is worth quoting (at page 206 of 36 S. Ct.):

> "It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked, and it is asserted to be a violation of the constitution of the

United States. The question presented is Federal and the Motion to dismiss is denied."

The same result for similar reasons was reached in case of *Sultan Railway and Timber Company v. Department of Labor and Industries*. 277 U.S. 135, 48 S. Ct. 505 (1928). There an order made by a state bureau pursuant to statutory authority was attacked on constitutional grounds. It was contended that the order, rather than the statute was attacked and therefore this court lacked jurisdiction within the meaning of Section 237 of the judicial code authorizing appeals to the Supreme Court of the United States. The contention was rejected for the reasons set forth by the court in the *Myles* case. The principle was again applied by this court to take jurisdiction in *McCollum v. Board of Education of Schools District No. 71*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 648, 2 A.L.R. 2d 1338. There the attack was made upon a program of religious instruction in public schools which program was held by the highest court of the State to have been authorized by state statute. The contention was made in that case that the statute itself had not been drawn in question within the meaning of the Federal Statute conferring jurisdiction upon this court, and the contention was again rejected by this court for the reasons announced in the *Myles* and *Sultan Railway* cases among others.

The Appellees seek to distinguish this case from those cited above upon the ground that the Order issued by the agency must be legislative in character. They argue that the Order in the case at Bar is specific, particular and individual, and does not lay down a rule for future application; and they assert, therefore, that the principle of *Myles*, *Sultan Railway* and *McCollum* and cases therein cited, does not apply. This is a novel argument. In sub-

stance it asserts that constitutional rights may not be denied by administrative orders issued pursuant to statutory authority if the order is of such a character that it has general application to future cases, but that constitutional rights may be denied by such administrative orders if they have application only to particular individuals. None of the cases cited by the Appellees in their Motion to Dismiss or Affirm, and no case which these appellants have discovered would sustain such an invidious distinction. Constitutional rights are individual rights as this court has held in numerous decisions.

The Question Here Presented Is A Substantial One

The Appellees claim in their Motion to Dismiss or Affirm that the question at bar is not a substantial one. They assert that the Commission was merely enforcing the regulatory provisions of the Maryland Real Estate statute, and therefore no substantial Federal question is involved. However, as is indicated in the opinion of the Baltimore City Court and the opinion of the Maryland Court of Appeals, it is well settled that all persons have a constitutional right to purchase and sell property wherever situated without regard to race, color, creed, or national origin. Citing *Shelly v. Kramer*, 331 U.S. 803, 67 S. Ct. 1751, 91 L. Ed. 1826.

In the present case, the sole purpose of the complaints which were filed against these Appellants was to prevent so-called block busting, i.e., the sale to Negroes of homes in formerly all-white neighborhoods. Therefore, the motive which gave rise to this procedure was a purpose forbidden to the state itself by the Constitution. It is clear that if the Real Estate Commission had by its own authority, sought to deprive these Appellants of their licenses to prevent them from selling property to Negroes in formerly all white neighborhoods, the Commission's

Order could not stand. It is also true, on the other hand, that the Commission as an agency of the State of Maryland has the right and the duty to exercise the State's authority for the purpose of protecting its citizens against substantial evils. But where the primary purpose of invoking the powers of a state agency is really to accomplish an unconstitutional purpose, that is, a purpose which the state may not constitutionally pursue, the evil which is made the subject of state authority must be real and substantial, as distinguished from trivial and technical. See *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1959).

In the present case as is stated in the jurisdictional statement (page 10) the sole act for which these appellants were penalized was the alleged posting of a Sold sign on property which allegedly had not been sold. Assuming that the evidence would sustain the commission's finding of fact in this regard, which is not conceded, it would nevertheless follow that no substantial interest of any citizen of Maryland or of the State itself was invaded by the alleged act. Consequently, the sole evil which was condemned and sought to be penalized by the Commission's Order was the technical violation of the State's statute as construed by the Court of Appeals of Maryland. This is also true of the alleged unlawful listing agreement. The Agreement itself and all the evidence showed that these Appellants' listings continued for six months only and therefore in substance, as distinguished from legal form, contained a "definite termination date."

The appellees argue that the provision in the Agreement preventing the termination of the Agreement while negotiations are pending renders the Agreement unlawful under the Maryland Statute. This argument is difficult to follow

in view of the settled law in this jurisdiction that a broker who procures a sale in conformity with the listing agreement is entitled to his commissions even though the seller changes his mind and terminates the contract. *Jones v. Adler*, 34 Md. 440; *Howard v. Street*, 93 A. 923, 125 Md. 288.

Therefore the provision in the Agreement is not unlawful in as much as it is merely declaratory of rights conferred upon the broker by the Common law of this state. From all this it follows that the alleged unlawful listing agreement was held to be unlawful merely because it contained language which on its face did not appear to be in strict conformity with technical statutory requirements.

In both cases therefore these Appellants' licenses have been put in jeopardy on complaint of citizens seeking to use a State Agency to deprive the Appellants of their constitutional rights and the Commission has invoked its powers to suspend their licenses for alleged violations of statutory requirements which are technical and trivial as distinguished from real and substantial. What we have said clearly indicates the importance of the constitutional question here presented.

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